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**In The
Supreme Court of the United States**

OHIO MIDLAND, INC. and ROGER BARACK,
Petitioners,

v.

GORDON PROCTOR, Director, Ohio Department of
Transportation, and JIM SPAIN, Deputy Director,
District 11, Ohio Department of Transportation, and
NORFOLK SOUTHERN RAILWAY,
Respondents.

*On Petition for Writ of Certiorari to the United
States Court of Appeals for the Sixth Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a cause of action for a *per se* permanent physical taking of private property by government, without just compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution, accrue when government first temporarily takes the property, or when the owner is "reasonably on notice" the taking may be permanent, or when the taking actually becomes permanent and the owner knows or should know it is permanent?

2. Where Congress reserved to itself the authority to "alter, amend, or repeal" an act granting its consent to "construct, maintain and operate" a bridge over navigable waters of the United States and later delegated all of its reserved authority to an administrative agency of the executive branch, and where Congress further provided that any deviation from approved bridge plans is unlawful "unless the modification of such plans has previously been submitted to and received the approval of" the administrative agency, does adjudication of a private contract claim that the bridge must be removed require a prior determination of whether the bridge must be removed, by the administrative agency to which Congress delegated all of its reserved authority?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs-Appellants: Ohio Midland, Inc. and Roger Barack. Ohio Midland, Inc. has no parent corporation, and no publicly traded corporation owns any of its stock.

Defendants-Appellees: Gordon Proctor, Director, Ohio Department of Transportation; Jim Spain, Deputy Director, Section 11, Ohio Department of Transportation; Norfolk and Southern Railway Co.¹

¹ Other defendants in this action are Joe Manchin, Governor of West Virginia, the City of Benwood, West Virginia, and the Commandant of the United States Coast Guard. These defendants were not parties to the appeal, and are not parties to this Petition, because Petitioners have not appealed any orders applicable to them. The Commandant, however, is a "party to be served" under this Court's Rule 29.4(a), and has been served with a copy of this Petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Ohio Midland, Inc. and Roger Barack respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. A) is published at 286 Fed. Appx. 905 (6th Cir. 2008). The district court's opinion and order denying leave to file an amended complaint (Pet. App. D) is unpublished. The district court's opinion and order dismissing the claims against defendants Proctor and Spain, as stated in the original complaint (Pet. App. E), are unpublished. The district court's opinion and order granting summary judgment on defendant Norfolk Southern's counterclaim for breach of contract (Pet. App. B) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 2008. The court denied a petition for rehearing and rehearing en banc on October 30, 2008. (Pet. App. H). This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

Ohio Revised Code 2305.10(A) provides, in relevant part: "An action for bodily injury or injuring personal property shall be brought within two years after the cause thereof arose."

33 U.S.C. 491 provides, in relevant part: "When, after March 23, 1906, authority is granted by Congress to any persons to construct and maintain a bridge across or over any of the navigable waters of the United States, such bridge shall not be built or commenced until the plans and specifications for its construction have been submitted to the Secretary of Transportation for the Secretary's approval, nor until the Secretary shall have approved such plans and specifications and the location of the bridge and accessory works; and when the plans for any bridge to be constructed under the provisions of §491 to §498 of this title, have been approved by the Secretary it shall not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such plans has previously been submitted to and received the approval of the Secretary."

33 U.S.C. 494 provides, in relevant part: "No bridge erected or maintained under the provisions of §491 to §498 of this title, shall at any time unreasonably obstruct the free navigation of the waters over which it is constructed, and if any bridge erected in accordance with the provisions of said sections, shall, in the opinion of the Secretary of Transportation, at any time unreasonably obstruct such navigation, it shall be the duty of the Secretary of Transportation, after giving the parties interested reasonable opportunity to be heard, to notify the persons owning or controlling such bridge to so alter the same as to render navigation through or under it reasonably free, easy, and unobstructed, stating in such notice the changes required to be made, and prescribing in each case a reasonable time in which to make such changes, and if at the end of the time so specified the changes so

required have not been made, the persons owning or controlling such bridge shall be deemed guilty of a violation of such sections; and all such alterations shall be made and all such obstructions shall be removed at the expense of the persons owning or operating said bridge."

33 U.S.C. 498 provides: "The right to alter, amend, or repeal §491 to §498 of this title is expressly reserved as to any and all bridges which may be built in accordance with the provisions of said sections, and the United States shall incur no liability for the alteration, amendment or repeal thereof to the owner or owners or any other persons interested in any bridge which shall have been constructed in accordance with its provisions."

H.B. 11901 passed September 1, 1922 provides specifically regarding the Bellaire Bridge:

"An Act—Authorizing the construction of a bridge across the Ohio River to connect the city of Benwood, West Virginia, and the city of Bellaire, Ohio.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Interstate Bridge Company, a corporation organized and existing under the laws of the State of Ohio, its successors and assigns, is hereby authorized to construct, maintain and operate a bridge and approaches thereto across the Ohio River, at a point suitable to the interests of navigation, to and into the city of Benwood, Union District, county of Marshall, in the State of West Virginia, from the central part of the city of

Bellaire, county of Belmont, in the State of Ohio, in accordance with the provisions of the Act entitled "An Act to regulate the construction of bridges over navigable waters," approved March 28, 1906.

Sec. 2 that the right to alter, amend, or repeal this Act is hereby expressly reserved. Passed the House of Representatives September 1, 1922."

STATEMENT OF THE CASE

On September 1, 1922, Congress granted its consent to the Interstate Bridge Company (IBC) to "construct, maintain and operate" a toll bridge over the Ohio River between Bellaire, Ohio and Benwood, West Virginia. Congress reserved to itself the authority to "alter, amend or repeal" the act. *See* H.B 11901, *supra*. Before constructing the bridge, IBC leased from the Pennsylvania Railroad Company (PRC) a parcel of land on the Ohio side of the river on which to build one of the bridge's piers. The lease agreement provided that IBC "shall at its own cost and expense construct, maintain, renew, and **ultimately** remove said bridge and pier and each and every part thereof upon, over and across the tracks and property owned or controlled by" the PRC (Emphasis Added). The agreement also provided that it shall be binding upon the parties' successors and assigns. Respondent Norfolk Southern Railway Company (NSR) is a successor of the PRC. Petitioner Barack is an assignee of IBC, and Petitioner Ohio Midland is an assignee of Barack. (Pet. App. A)²

² While most of the facts presented in this Statement are contained in the opinion of the court of appeals, some of the facts

IBC constructed and operated the bridge as a toll bridge until 1991. On December 5, 1990, as part of a project to improve State Route 7 in Ohio, the Ohio Department of Transportation (ODOT) entered into a contract with IBC to purchase the original ramp to the bridge span on the Ohio side, so that ODOT could remove the ramp, and build a new ramp once the highway project was completed. This contract contained no provision for payment of any damage to the remainder of the bridge. On January 7, 1991, ODOT attempted to enter into another contract with IBC that contained a provision for payment of damages to the remainder of the bridge. ODOT, however, paid no additional consideration, and IBC did not sign the purported second contract. ODOT purchased the ramp and removed it, which suspended operation of the bridge. *Id.*

ODOT prepared plans and specifications to build a new ramp, which would have allowed the bridge to resume operations. On March 22, 1991, Petitioner Barack purchased IBC's interest in the bridge, intending to resume operation of the bridge once the planned new ramp was built. Barack and IBC acknowledged that "the liabilities assumed clearly exceed the assets transferred," and as consideration for Barack's assumption of IBC's liabilities, IBC agreed to pay Barack \$700,000, less the amount (up to \$50,000) it would cost IBC to terminate a contract to demolish the remainder of the bridge. Among the liabilities

presented are contained in Petitioners' proposed Amended Complaint. Since leave to file the Amended Complaint was denied on the ground that amendment would be futile and would not survive a motion to dismiss, the allegations must be presumed to be true.

assumed by Barack were any liabilities arising from ODOT's purchase of the ramp and any potential obligation to remove the remainder of the bridge. *Id.*

ODOT, however, did not proceed with its plans to build a new ramp. Barack made repeated requests to ODOT over a number of years for permission to build a new ramp himself. ODOT, however, did not act on his requests; it neither denied nor granted permission for Barack to build a new ramp. In 1996, Barack assigned all his interest in the bridge to Petitioner Ohio Midland. *Id.*

In November, 1998, the United States Coast Guard determined that the bridge was an unreasonable obstruction to navigation because it had been out of operation for a number of years, and issued a notice to Barack to provide plans within sixty (60) days to demolish the bridge³. Barack did not do so, and on November 14, 2001 the Coast Guard ordered Barack to remove the bridge. Barack did not remove the bridge, so the Coast Guard brought an administrative action against Barack to impose civil penalties for his refusal to remove it. Barack requested a hearing, and on April 21, 2004, the hearing officer imposed civil penalties totaling \$598,200. Barack appealed both orders. On October 18, 2005, the Coast Guard Commandant issued a final agency decision, affirming the order to remove the bridge, but reducing the civil penalties to \$300,000 plus interest and costs. *Id.*

³ The United States Coast Guard, however, took no affirmative action against ODOT to submit plans and specifications for restoring the ramp that it demolished or to obtain approval of its alteration of the bridge ramp.

On November 17, 2005, Petitioners Ohio Midland and Barack filed an action against the Commandant under the Administrative Procedure Act, asserting nine errors in the administrative agency action, including that the Coast Guard failed to conduct a detailed investigation prior to issuing its orders (Case No. C2-05-1044). On December 5, 2005, Petitioners filed a second action - the action presently before this Court - naming various defendants, including Respondents Proctor, Spain and Norfolk Southern, as well as the Coast Guard Commandant (Case No. C2-05-1097). Claim One of the original complaint in this action (Case 1097) stated that, as successors to IBC, Petitioners were entitled to compensation from ODOT for damage to the remainder of the bridge caused by ODOT's taking of the ramp. Claim Two stated that ODOT breached the contract with IBC, and therefore with Petitioners, by not providing the salvage materials from the demolition of the ramp. Claims Three and Four stated that ODOT violated Petitioners' civil rights, conferred by H.B. 11901, to "construct, maintain and operate" the bridge by closing it without federal permission. As relief for Claims One through Four, Petitioners requested that ODOT be ordered to construct a new ramp and pay damages for loss of toll profits from the time ODOT removed the ramp, and damages for the fair market value of the salvage materials. Alternatively, Petitioners requested that ODOT be ordered to bring an appropriation action to determine the amount of damages due to Petitioners caused by ODOT's taking of the ramp, if ODOT were not ordered to build a new ramp. Petitioners also requested that ODOT be ordered to pay the civil penalties imposed by the Coast Guard and the cost of removing the bridge, if the court did not vacate the Coast Guard's orders. Claim Five stated that, if the

court did not order ODOT to build a new ramp, the bridge should be deemed abandoned, and the remainder of the bridge should be ordered to revert to the owners of the land on which it stood, including Respondent Norfolk Southern, the State of West Virginia and the City of Benwood, West Virginia. Claim Six stated essentially the same claims against the Coast Guard as were stated in Case 1044. *Id.*

The district court had original jurisdiction of this action pursuant to 28 U.S.C. 1331 because Petitioners' claims against Respondents Proctor and Spain were brought pursuant to 42 U.S.C. 1983 for deprivations of Petitioners' rights under the Constitution and laws of the United States.

The district court consolidated this action and Case 1044 because they contained common questions of law and fact. All the defendants moved to dismiss the original complaint in this action, on various grounds. In particular, Respondents Proctor and Spain contended that Claims One through Four were barred by sovereign immunity and by the applicable statute of limitations. On April 26, 2006, Respondent Norfolk Southern filed an Amended Answer and Counterclaim and, on the same day, moved for summary judgment on its counterclaim. Count One of the Counterclaim alleged that Petitioners had breached the lease agreement by failing to "ultimately remove" the bridge, and requested that the court order Petitioners to remove the bridge. *Id.*

On June 13, 2006, the district court dismissed Claim Five on the ground that it was not ripe. (Pet. App. G) On June 29, 2006, Petitioners filed a motion for leave to file an amended complaint, which

contained substantial amendments to the entire original complaint. In the proposed amended complaint, Claim 1 was brought under 42 U.S.C. 1983 against Respondents Proctor and Spain in their individual capacities. It stated that their failure to decide whether to permit Petitioners to build a new ramp to the bridge, thereby preventing Petitioners from operating the bridge, constituted a taking of the remainder of the bridge without just compensation, in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. Claim 2 was also brought against Proctor and Spain in their individual capacities pursuant to §1983, and stated that their failure to account to Petitioners for the fair market value of the salvage materials of the ramp constituted a taking in violation of the Fifth and Fourteenth Amendments. Claims 3 and 4 were also brought against Proctor and Spain in their individual capacities under §1983. These claims stated that Proctor and Spain, by failing to decide whether to build or to permit the building of a new ramp, deviated from the approved bridge plans without permission from the U.S. Secretary of Transportation, in violation of 33 U.S.C. 491, and thus impeding travel over and closing the bridge. Claim 5 stated, in the alternative to Claims 1 through 4, that the bridge residue was abandoned and had reverted to the landowners. Claims 6 and 7 were brought against the Coast Guard Commandant pursuant to 33 U.S.C. 502 and H.B. 11901, stating that the Coast Guard lacks authority to order Petitioners to remove the Bridge, and that it lacks jurisdiction over this dispute. Claim 8 was brought under §1983 against Proctor and Spain in their individual capacities. It stated that, in the event the court did not enjoin the Coast Guard from enforcing its orders, Proctor and Spain should be

ordered to pay the civil penalties and the cost of removing the remainder of the bridge because their violation of Petitioners' rights under federal law is the cause for Petitioners' inability to operate the bridge. With respect to all claims for monetary relief against Proctor and Spain, the amended complaint explicitly sought to impose personal liability on them. *Id.*

On November 28, 2006, the district court denied Petitioners' motion for leave to amend the complaint. The court focused solely on the proposed amendment of Claim 5, and concluded that amendment of Claim 5 would be futile because it did not cure the ripeness defect. The court did not address the proposed amendments to Claims 1, 2, 3, 4 and 8 against Respondents Proctor and Spain, even though the amended complaint made it clear that Proctor and Spain were being sued in their individual capacities, to impose personal liability upon them for the monetary relief sought by petitioners. (Pet. App. F) The district court later clarified that it had denied leave to file the entire amended complaint, even though it had only addressed Claim 5. (Pet. App. D) On December 28, 2006, the district court granted the motion to dismiss the claims as stated against Proctor and Spain in the original complaint. It found that the parties had "treated" the claims against Proctor and Spain as being brought against them in their official, not personal, capacities, and therefore the monetary claims against them were barred by sovereign immunity. The court also concluded that all the claims against Proctor and Spain, including the claims for injunctive relief, were barred by the applicable two-year statute of limitations. It reasoned that Petitioners had reason to know of the injury that is the basis of their claims as early as 1990-1991, and 2001 at the

latest, so that the claims accrued more than two years before this action was filed in 2005. (Pet. App. E)⁴

During the course of proceedings in this action, the Coast Guard Commandant filed a motion on May 10, 2006 to remand Case 1044 to the Coast Guard administrative agency action, to permit the Coast Guard to conduct a detailed investigation into whether the bridge constitutes an unreasonable obstruction to navigation and must be removed, and to reconsider its decision to impose civil penalties on Petitioner Barack. On March 6, 2007, the District Court granted this motion, thus remanding Case 1044 to the Coast Guard administrative agency action. (Pet. App. I). The Court later dismissed the Commandant from this action on the ground that Petitioners' claims against the Commandant were duplicative of their claims against him in Case 1044. (Pet. App. C) On December 19, 2007 as part of its investigation, the Coast Guard held a public hearing in Ohio concerning the use and operation of the bridge. The administrative agency action remains pending.

On March 30, 2007, **after** the Coast Guard administrative action had resumed, the district court in this action granted Respondent Norfolk Southern's motion for summary judgment on its counterclaim for breach of contract. It reasoned that, because the bridge had not been in use for a number of years, Petitioners now must comply with their duty under the lease from the railroad to "ultimately remove said bridge and pier

⁴ The district court also held that the statute of limitations was not tolled under the theory of "continuing violations." Petitioners do not present that issue in this Petition.

and each and every part thereof upon, over and across the tracks and property owned or controlled by" the railroad. Petitioners had contended that, under the doctrine of primary jurisdiction, further proceedings in this action should be stayed pending the outcome of the now-resumed Coast Guard administrative agency action. The court rejected this contention on the ground that Petitioners' duty to comply with the lease does not depend upon the outcome of the administrative agency action. The court ordered Petitioners to comply with the terms of the lease. (Pet. App. B)

Petitioners appealed only the denial of leave to file the amended claims as stated against Respondents Proctor and Spain in the amended complaint, and the grant of summary judgment to Respondent Norfolk Southern. The court of appeals affirmed the district court's denial of leave to amend the claims against Proctor and Spain on the ground that all the amended claims against them (Claims 1, 2, 3, 4 and 8) were barred by the statute of limitations, and therefore amendment would be futile. The court stated that a statute of limitations under federal law begins to run "when plaintiffs knew or should have known of the injury which forms the basis of their claims." (quoting *Ruff v. Runyon*, 258 F. 3d 498, 500 (6th Cir. 2001)). In concluding that the limitations period had expired, the court reasoned as follows:

"...although the precise timing is not clear from the record, it is clear that Barack would have been **on notice** during the early 1990's that ODOT did not intend to rebuild the ramp. Moreover, Barack **realistically was on notice** that ODOT did not intend to allow him to build

his own ramp sometime during the early 1990's, when ODOT is alleged to have repeatedly refused to grant Barack permission to build his own ramp, whether through an outright denial of permission or inaction on his requests. Even giving plaintiffs the benefit of the doubt, Barack was certainly on notice that there would be no ramp in 1998, when ODOT was prepared to stand by and allow the bridge to be razed following the Coast Guard's demolition order. Consequently, the plaintiffs had **reason to know** of their injury in the early 1990s, and in 1998 at the latest, and the statute of limitations therefore accrued much longer than two years before plaintiffs commenced suit in 2005." (Emphasis added).⁵

The court of appeals also affirmed the grant of summary judgment to Respondent Norfolk Southern on its counterclaim for breach of contract. The panel reasoned:

"Because all parties agree that the plaintiffs have a contractual duty to remove the bridge

⁵ While the opinion states that the "statute of limitations" accrued more than two years before suit was filed, presumably the appellate panel meant to say that the *claims* accrued more than two years before suit was filed. Since the panel held that these claims are time-barred, it did not reach the issue whether the monetary claims are barred by sovereign immunity. The proposed Amended Complaint, however, explicitly and repeatedly alleges that Respondents Proctor and Spain are being sued in their individual capacities, to impose personal liability upon them for Petitioners' monetary claims. Thus, it is clear that the monetary claims are not barred by sovereign immunity. *Kentucky v. Graham*, 473 U.S. 159 (1985)

once it can no longer be used as a bridge, it is fair to say – as the district court did – that this duty was triggered sometime in the sixteen years during which the bridge has been inoperable with no reasonable expectation of re-use. **This duty in no way hinges on the actions of the Coast Guard.**” (Pct. App. A) (Emphasis added).

REASONS FOR GRANTING THE WRIT

I.

This case presents an important question of federal law under the Takings Clause of the Fifth Amendment upon which the courts of appeals are divided in the wake of this Court’s decisions in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). In order to strike the proper balance between the fundamental protections afforded by the Takings Clause and the policies of repose expressed by statutes of limitations, this conflict should be resolved by this Court. Moreover, the decision of the court below is wrong, because it conflicts with this Court’s holdings in *Loretto* and *Lucas* that a *per se* permanent physical Takings claim may be brought only when a governmental taking of property has become “permanent.” The Sixth Circuit’s contrary rule should be reviewed and reversed by this Court.

A. The Courts Of Appeals Are Divided Over The First Question Presented

The statute of limitations for claims brought pursuant to 42 U.S.C. 1983 is the most closely analogous state limitations statute for general personal injury claims. *Wilson v. Garcia*, 471 U.S. 261 (1985); *Owens v. Okure*, 488 U.S. 235 (1989). In Ohio, the statute of limitations for general personal injury claims, and therefore the one applicable to §1983 claims, is O.R.C. 2305.10(A). *Browning v. Pendleton*, 860 F. 2d 989 (6th Cir. 1989). When a claim brought pursuant to §1983 accrues, however, is a question of federal law. *Wilson, supra*, 471 U.S. at 268-71.

In this case, amended Claims 1, 2 and 8 all allege deprivation of Petitioners' right under the Fifth Amendment, applicable to the states under the Fourteenth Amendment, not to have property taken without just compensation. Where government interferes with the use of private property and inflicts "an injury of such a character as substantially to oust the owner from the possession of the land and to **deprive him of all beneficial use thereof**, there is a taking in the constitutional sense." 2 Nichols on Eminent Domain (3d Ed. 1983). (Emphasis Added) Such interference can take the form of either a permanent physical taking or a permanent regulatory taking. A permanent physical taking occurs when there has been "a physical invasion of the property affected by the appropriation, an actual seizure of the premises or a permanent ouster of the owner, or **such an interference with the rights of an owner as to deprive him of control of his property**." *Id.* at 6.05 (Emphasis Added) See also, *Id.* at 6.07 ("the complete destruction of the use and value of property

unquestionably constitutes a taking.”) Accordingly, this Court has established the rule that a permanent physical occupation of private property is a *per se* taking within the meaning of the Fifth Amendment, without regard to the public interests that it may serve, whereas a “temporary invasion” may or may not be a taking, depending on a case-specific analysis of the public interests served by the invasion. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Court has extended this rule to regulatory measures that permanently deny all economically beneficial or productive use of private property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (regulation that permits no economically beneficial or productive use of real property constitutes *per se* taking, without case-specific inquiry into the public interests regulation may serve); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) (*per se* rule of *Lucas* applies only to permanent deprivations of all economically beneficial use, not to temporary deprivations). Thus, both physical and regulatory takings are *per se* takings when they are permanent in nature.

In this case, amended claims 1, 2 and 8 are *per se* permanent physical takings claims, in the form of a permanent interference with the rights of a property owner that has destroyed all economically beneficial use of the property. These claims all allege that Respondents Proctor’s and Spain’s failure to decide whether to permit Petitioners to construct a replacement ramp to the bridge has permanently deprived them of all economically beneficial use of the bridge. The court of appeals decided that these claims accrued more than two years before suit was filed in

2005. Thus, the issue presented by this case is: when does a claim of a *per se* permanent physical taking of property accrue?⁶

In the wake of *Loretto*, courts of appeals have rendered conflicting decisions on when a *per se* permanent physical taking claim accrues. This conflict was foreshadowed by the dissenting opinion in *Loretto*, which predicted that it would be difficult to determine what is a "permanent occupation" as opposed to a "temporary invasion" of real property. It observed that "permanent" in this context cannot be given its ordinary meaning of "forever," because government "occupation" can always be abandoned, so that no occupation could ever be "permanent" in the ordinary meaning of that word. *Loretto*, 458 U.S. at 448 (dissenting opinion). The dissent, however, did not offer a definition of "permanent" that would be appropriate for determining whether a property owner has a valid *per se* permanent physical takings claim.

Not surprisingly, then, the courts of appeals are divided over when a *per se* permanent physical taking claim accrues. At one end of the spectrum, the Tenth Circuit has held that "whether a physical taking is permanent or temporary is irrelevant to the application of the statute of limitations because the accrual date is the same for both. Under either rubric, the limitations period begins to run at the time of the taking." *McIntyre v. Board of County Com'rs of County*

⁶ With respect to amended Claims 3 and 4, the issue is the same: when does a claim that state officials have permanently impeded travel over and permanently closed a bridge authorized by Congress, without obtaining Coast Guard approval to modify the approved bridge plans in violation of 33 U.S.C. 491, accrue?

of *Gunnison, Colo.*, 252 Fed. Appx. 240, 246 (10th Cir. 2007). The 1st Circuit, over a dissent, follows the view of the Tenth Circuit. *Vistamar, Inc. v. Fagundo-Fagundo*, 430 F. 3d 66 (1st Cir. 2005) (the dissenting opinion in *Vistamar* would follow the rule now adopted by the Federal Circuit – see below – that a takings claim does not accrue until all events have occurred that fix the government’s liability **and** the plaintiff knew or should have known of those events. *Id.* at 1379). Under the Tenth and First Circuits’ accrual rule, Petitioners’ permanent physical takings claims in this case accrued on the very first day Respondents Proctor and Spain failed to decide whether to permit Petitioners to build a replacement ramp—in 1991—so that the limitations period would have expired by the time suit was filed in 2005.

The Sixth Circuit, on the other hand, has fashioned a rule that a permanent physical taking claim accrues when a property owner is “realistically on notice” that a physical taking may have become permanent. Under that rule, there is not a certain date when Petitioners’ takings claims accrued, but they accrued “sometime during the early 1990’s,” or “in 1998 at the latest” because they were “on notice” that Respondents would not build, and would not permit Petitioners to build, a replacement ramp.

Finally, the Federal Circuit has taken the position that a *per se* permanent physical takings claim accrues when all the events have occurred which fix the liability of the government so as to entitle the claimant to institute an action, **and** the claimant knew or should have known of those events; accordingly, a *per se* permanent physical takings claim accrues when (1) a physical taking **actually** becomes permanent, and

(2) the owner knows or has reason to know the taking has become permanent. *John R. Sand & Gravel Co. v. United States*, 457 F. 3d 1345 (Fed. Cir. 2006) (*aff'd on other grounds*, – U.S. –, 128 S. Ct. 750 (2008)). Under that rule, Petitioners' takings claims did not accrue until October 18, 2005, and therefore are not time-barred because this action was filed a month later. Until October 18, 2005, Respondents Proctor and Spain could have taken action on Petitioners' repeated requests to build a replacement ramp and could have granted the request, so that the deprivation of the use of the bridge remained temporary. Deprivation of all economical beneficial use of the bridge only became permanent when the Coast Guard Commandant issued the final agency decision to remove the remainder of the bridge, thus rendering Petitioners' loss of use of the bridge permanent.

B. When a *per se* Permanent Physical Takings Claim Accrues Presents an Important Question of Federal Law

First, while this circuit conflict has arisen in *per se* permanent physical takings cases, it has important implications for *per se* permanent regulatory takings claims as well. As discussed above, government regulation that permanently deprives property of all economically beneficial use is a *per se* taking that requires just compensation, whereas a temporary deprivation is not. *Lucas, supra*; *Tahoe-Sierra, supra*. An essential element of both physical and regulatory *per se* takings claims is that the deprivation of use must be permanent in nature. Therefore, the issue of when a *per se* physical takings claim accrues is virtually identical to when a *per se* regulatory takings claim accrues: does such a claim accrue when

government first temporarily deprives property of all economically beneficial use, or when the owner is "reasonably on notice" that the deprivation may be permanent, or when the deprivation is **actually** permanent and the owner knows or should know it is actually permanent? Thus, resolution of this issue will apply to all *per se* takings claims, both physical and regulatory.

Second, this Court has always recognized the fundamental importance of the prohibition against taking private property without just compensation. See, e.g., *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 177 (1871) (Takings Clause "has always been understood to have been adopted for protection and security to rights of individuals as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them..."); *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 235-36 (1897) ("Due protection of the rights of property has been regarded as a vital principle of republican institutions....The requirement that property shall not be taken without just compensation is but 'an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.' "(quoting 2 Story, Const. (1790))); *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens

which, in all fairness and justice, should be borne by the public as a whole.”)

At the same time, this Court has recognized that statutes of limitations serve important “policies of repose.” *See, e.g., Board of Regents of University of State of N.Y. v. Tomanio*, 446 U.S. 478, 487 (1980) (“The process of discovery and trial which results in the finding of ultimate facts for or against the plaintiff by the judge or jury is obviously more reliable if the witness or testimony in question is relatively fresh. Thus in the judgment of most legislatures and courts, there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred without respect to whether it is meritorious.”) Thus, determining the proper accrual rule for *per se* takings claims requires that this Court strike the proper balance between protecting individual property rights against “uncontrollable power” of government, and protecting the “accuracy of the fact-finding process” and “settled expectations” that, after a certain lapse of time, one may rest assured that potential claims are barred.

II.

This case also presents a second important question of federal law. The second question presented concerns the scope of authority reserved by Congress to regulate bridges over the navigable waters of the United States, and then delegated to an administrative agency of the executive branch. This question has not been, but should be, settled by this Court because the court below decided this question incorrectly, and its

decision conflicts with relevant decisions of this Court concerning the primary jurisdiction of executive branch administrative agencies.

A. This Case Presents An Important Question Concerning The Scope Of Authority Reserved By Congress To Regulate Bridges Over The Navigable Waters Of The United States, And Then Delegated To An Administrative Agency Of The Executive Branch.

The constitutional power conferred upon Congress to regulate interstate commerce includes plenary authority to regulate construction of bridges over navigable waters of the United States. *Gilman v. Philadelphia*, 70 U.S. 713 (1866). Congress exercised this plenary authority with passage of the Rivers and Harbors Appropriation Act of 1899, which prohibited construction of bridges over navigable waters until the consent of Congress has been obtained and bridge plans have been approved by the Secretary of Transportation. The Act further provided that, once bridge plans have been approved by the Secretary, it is unlawful to deviate from such plans “either before or after completion” of the bridge, unless modification of the plans have been approved by the Secretary. The relevant portions of this Act are codified at 33 U.S.C. 401.

In the Bridge Act of 1906, Congress provided that when, after March 23, 1906, it grants authority to “construct and maintain” a bridge, the bridge shall not be built until plans and specifications have been approved by the Secretary. Once the Secretary has approved such plans, it is unlawful to deviate from the

approved plans "either before or after completion" of the bridge, unless the Secretary has approved modification of the plans. This provision is codified at 33 U.S.C. 491. The Act of 1906 further provided that no bridge constructed with congressional consent shall unreasonably obstruct navigation, and the Secretary was provided with authority, after notice and hearing, to enforce this prohibition by ordering the obstruction removed (codified at 33 U.S.C. 494). Violation of such an order may be enforced by civil and criminal penalties (codified at 33 U.S.C. 495). Finally, Congress reserved the right to "alter, amend or repeal" the Act as to all bridges built in accordance with its provisions. This provision is codified at 33 U.S.C. 498.

In 1922, Congress passed H.B. 11901, authorizing construction and operation of the bridge that is the subject of these two civil actions, and reserving to itself the right to "alter, amend or repeal" the authority thus granted. After this bridge was built, Congress passed the General Bridge Act of 1946, in which it granted general consent for the construction, maintenance and operation of bridges over navigable waters where the Secretary of Transportation has approved the plans for such bridges. This Act is codified at 33 U.S.C. 525.

In 1966, Congress transferred all bridge regulatory authority, not already delegated to the Secretary of Transportation, to the Secretary. Pub. L. 89-670 §6(g)(6)(c). The Secretary of Transportation has designated the Commandant of the Coast Guard to exercise the authority Congress delegated to the Secretary. 49 C.F.R. §1.45(b) and 1.46(c). In 2003, the Coast Guard was transferred to the new Department of Homeland Security, but the designation of the Commandant to exercise the authority delegated by

Congress remained the same. Thus, the Coast Guard is the administrative agency that exercises the authority reserved by Congress to "alter, amend or repeal" a grant of authority to construct and operate a bridge, the authority to approve modification of bridge plans, and the authority to order removal of unreasonable obstructions to navigation.

Here, companion case 1044 was remanded, upon motion by the Coast Guard, to that agency to conduct a detailed investigation of whether the bridge is an unreasonable obstruction to navigation and must be removed, and to reconsider the imposition of civil penalties. The district court rejected Petitioners' contention that, under the principle of primary jurisdiction, adjudication of Respondent Norfolk Southern's motion for summary judgment must be stayed, pending determination by the Coast Guard of whether the bridge must be removed. The court of appeals agreed, reasoning that adjudication of Norfolk Southern's counterclaim that Petitioners must now "ultimately remove" the bridge does not depend upon any determination by the Coast Guard as to whether the bridge must be removed.

Petitioners' contention is that adjudication of Norfolk Southern's private contract claim that the bridge must be removed requires that the Coast Guard must first determine whether the bridge must be removed as an unreasonable obstruction to navigation, or determine whether the approved bridge plans should be modified to permit such removal. In the leading appellate decision construing the Bridge Acts of 1899, 1906 and 1946, the Eighth Circuit held that the removal of bridge structures authorized by Congress is within the plenary power of Congress, and

an approved bridge can be removed only pursuant to this power:

"It is to be borne in mind that the authorizing, the locating, the constructing, the maintaining, the changing, **and the removing** of bridges or other structures in navigable streams, as questions of relationship to navigation, are matters **wholly of legislative prerogative and control**. [citations omitted].... **there is no right to do any of these things in the navigable waters of the United States, if Congress chooses not to allow them to be done.** Within its plenary power of control in this field, Congress may permit or may forbid any or all of them to be done." *United States v. Ingram*, 203 U.S. 91, 94 (8th Cir. 1953) (Emphasis Added).

In exercising this plenary power, Congress provided that, once bridge plans were approved, it was unlawful to deviate from them "either before or after completion of the structure," unless the relevant agency had approved a modification of the plans. The appellate court held that this requirement is a plain, unequivocal and absolute condition upon a congressional authorization to construct a bridge, and that removal of any portion of a congressionally authorized bridge, without agency approval for modification of the plans, constitutes an illegal deviation from the approved plans. *Id.* at 95-6.

Under this construction of the statutory scheme, removal of the bridge that is the subject of these actions is subject to the plenary power of Congress, including the conditions Congress has imposed.

Removal of the bridge constitutes an unlawful deviation from the approved bridge plans, unless the Coast Guard, exercising the authority Congress delegated to the Secretary of Transportation, has approved a modification of the plans to permit removal of the bridge, or has determined that the bridge must be removed as an unreasonable obstruction to navigation. Thus, adjudication of a private contract claim that the bridge must be removed requires a prior determination by the Coast Guard that the approved bridge plans should be modified so as to permit removal of the bridge, or that the bridge must be removed as an unreasonable obstruction to navigation. The court of appeals held that adjudication of the contract claim does not require such a determination. Therefore, this case squarely presents the second question.

The second question is an important question of federal law because it implicates the plenary authority of Congress, derived from its constitutional authority over interstate commerce, to govern the construction, operation, and modification (including removal) of bridges over the navigable waters of the United States. Congress has, by the statutory scheme described above, prescribed the policies to govern such bridges. It reserved to itself the power to "alter, amend or repeal" the authority to construct and operate any such bridge, and it delegated all its reserved power to an administrative agency of the executive branch, including the exclusive power to modify approved bridge plans, and the exclusive power to order the removal of an approved bridge as an unreasonable obstruction to navigation.

Until now, the exclusive powers to modify approved bridge plans and to order the removal of a congressionally approved bridge have not been subject to private action. See, e.g., *Miller v. Mayor, etc., of City of New York*, 109 U.S. 385 (1883) (bridge constructed under authority of Congress must be deemed "a lawful structure" that is not subject to a private nuisance action seeking to order its removal). Under the court of appeals' decision in this case, however, private parties would have the authority to agree to remove a bridge authorized by Congress and approved by an administrative agency, even though neither Congress nor the agency has decided that it must be removed. The fundamental premise of the court of appeals' decision is that the plenary authority of Congress to prescribe the policies to govern bridges over navigable waters is subject to private agreement. If this is an acceptable premise, can private parties agree to convert a railroad bridge over navigable waters to a pedestrian bridge, even though Congress has not consented and the Coast Guard has not approved a modification of the approved bridge plans? Thus, the second question presented is an important question of federal law because it concerns whether private parties may agree to take action independent of, and not subject to, the plenary authority of Congress concerning the same action.

B. The Second Question Presented Has Not Been, But Should Be, Settled By This Court Because, If The Court Of Appeals Decided This Question Incorrectly, Its Decision Conflicts With Relevant Decisions Of This Court Concerning The Primary Jurisdiction Of Executive Branch Agencies.

This Court has not decided whether private parties may agree to remove a congressionally authorized bridge even though Congress has not consented to its removal and the Coast Guard has not finally decided whether it must be removed. However, this Court has long held that, in order to assure a proper working relationship between courts and administrative agencies of the executive branch, an issue raised in a civil action that Congress has confided to an administrative agency should be determined by the agency prior to adjudication of the claim in the civil action. This is the principle of "primary jurisdiction" of administrative agencies. *See generally*, Pierce, *Administrative Law Treatise*, 14.1 (4th Ed. 2002); Jaffe, *Judicial Control of Agency Action*, 122-132 (1965); Wright and Koch, 33 *Federal Practise and Procedure*, 8399 (2006).

Under this Court's jurisprudence, the principle of primary jurisdiction comes into play where a court has original jurisdiction of a claim, independent of the statute governing agency proceedings, but adjudication of the claim requires determination of an issue that Congress has directed must be decided by an administrative agency. In such a case, adjudication of the claim is to be stayed pending determination of the issue by the agency. The court retains jurisdiction to

adjudicate the claim once the agency has determined the issue. *United States v. Western Pac. R. Co.*, 352 U.S. 59, 63-4 (1956); *Maritime Terminal v. Rederi Transatlantic*, 400 U.S. 62, 68 (1970); *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 302 (1973); *Reiter v. Cooper*, 507 U.S. 258, 268 (1993).⁷

In this case, if the court of appeals erred in deciding that adjudication of Respondent Norfolk Southern's contract counterclaim to remove the bridge does not depend upon the Coast Guard's determination of whether the bridge must be removed, and the adjudication of Norfolk's counterclaim **does** require such a determination, then the court of appeals' decision conflicts with the relevant decisions of this Court concerning the primary jurisdiction of administrative agencies. If, as Petitioners contend, adjudication of the counterclaim requires a prior determination by the Coast Guard of whether the bridge should be removed, the principle of primary jurisdiction established by this Court required that the district court stay adjudication of the counterclaim pending determination of that issue by the Coast Guard. Since the district court erred as a matter of law in not staying its adjudication of the counterclaim, the court of appeals should have reversed the grant of summary judgment, with instructions to stay further proceedings on the counterclaim pending determination by the Coast Guard of whether the bridge must be removed. Since the court of appeals did

⁷ Primary jurisdiction also applies where a plaintiff asserts a claim over which Congress has conferred exclusive jurisdiction on an administrative agency. In that situation, the claim must be dismissed, rather than stayed. See, e.g., *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907).

not do so, and instead affirmed the grant of summary judgment on the counterclaim, its decision conflicts with this Court's primary jurisdiction jurisprudence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX A

**NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION**

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 07-3575

[Filed July 1, 2008]

OHIO MIDLAND, INC.,)
ROGER BARACK,)
)
Plaintiffs-Appellants,)
)
v.)
)
OHIO DEPARTMENT OF)
TRANSPORTATION, DISTRICT 11, JIM)
SPAIN, DEPUTY DIRECTOR; THOMAS H.)
COLLINS; JOE MANCHIN III, WEST)
VIRGINIA GOVERNOR; NORFOLK)
SOUTHERN RAILWAY CO.; CITY OF)
BENWOOD MAYOR'S OFFICE,)
)
Defendants-Appellees.)

**ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO**

Before: GILMAN, ROGERS, McKEAGUE, Circuit Judges.

ROGERS, Circuit Judge. In this 42 U.S.C. § 1983 action, the plaintiffs appeal the district court's denial of their motion for leave to amend their complaint and appeal the district court's grant of summary judgment to defendant Norfolk Southern Railway on its counterclaim for breach of contract. Plaintiffs are the owners of a bridge spanning the Ohio River, and have sought to compel the Ohio Department of Transportation either to rebuild the bridge ramp it demolished in 1991 or to pay the plaintiffs damages resulting from lack of the ramp, including the bridge's long-term non-use and the plaintiffs' potential liability to tear the bridge down pursuant to a demolition order from the United States Coast Guard. For the following reasons, we uphold both the district court's denial of leave to amend and its grant of summary judgment to Norfolk Southern.

I. Factual Background

On September 12, 1922, Congress authorized the Interstate Bridge Company (IBC) to construct, maintain, and operate a toll bridge over the Ohio River between Bellaire, Ohio, and Benwood, West Virginia, reserving to itself the authority to alter, amend, or repeal the act. *See* H.B. 11901. Before constructing the bridge, IBC leased from the Pennsylvania Railroad Company a parcel of land on the Ohio side of the river for construction of one of the bridge's piers. The lease agreement provided that IBC "shall at its own cost and expense construct, maintain, renew, and ultimately remove said bridge and pier and each and every part thereof, upon, over and across the tracks and property

owned or controlled by" the Pennsylvania Railroad Company, and also provided that the agreement would be binding on both parties' successors and assigns. Defendant Norfolk Southern Railway Company is a successor of the Pennsylvania Railroad Company.

The Bellaire Bridge operated as a toll bridge until 1991, when the Ohio Department of Transportation (ODOT) purchased from IBC the bridge ramp on the Ohio side of the river and its underlying land for the purpose of constructing Ohio Route 7, which construction would require that the bridge ramp be torn down. The plaintiffs in the instant case allege that two contracts were involved in this purchase. According to the plaintiffs, the first contract—executed on December 5, 1990—made no provision for damages to the residue of the bridge owned by IBC. Plaintiffs also claim that the December 5 contract entitled IBC to salvage materials from the area of the ramp acquired by ODOT. A later contract executed on January 7, 1991, however, allegedly required compensation for damages to the residue of the bridge. The plaintiffs claim that the second contract is void for lack of consideration and because IBC did not sign it. Accordingly, the plaintiffs claim that the first contract, in which compensation for damage to the bridge residue is not provided, is controlling.

Following sale of the bridge ramp to ODOT, plaintiff Roger Barack purchased IBC's remaining interest in the bridge on March 21, 1991. Barack and IBC acknowledged in the purchase agreement that "the liabilities assumed clearly exceed the assets transferred," and in consideration for Barack's assumption of IBC's liabilities, IBC paid Barack \$ 700,000, less the amount it would cost IBC to

terminate a demolition contract. The agreement specifically acknowledged ODOT's purchase of the bridge ramp and provided that Barack would assume, among other liabilities, all liabilities of IBC

arising by reason of that certain Purchase Agreement whereby the Ohio Department of Transportation purchased the Ohio ramp to the Bellaire Bridge owned by [IBC] and conveyed therewith by Agreement dated the 5th day of December, 1990, and as supplemented by letter addendum to said Agreement dated December 17, 1990, and as supplemented by Contract of Sale and Purchase dated January 7, 1991, by and between [ODOT] and [IBC]

JA 182-83. The agreement also provided that Barack would assume "[a]ll liabilities or future obligations of [IBC] arising by reason of the ownership of the Bellaire Bridge, including any obligation on the part of [IBC] to demolish, raze and remove the remaining bridge structure" Plaintiffs claim that, around the same time that ODOT tore down the ramp and constructed Route 7 in its place, ODOT bought land and prepared plans to rebuild the ramp over the newly constructed Route 7, which would have allowed the bridge to continue operation as a toll bridge. Barack claims that, believing ODOT intended to rebuild the ramp, he intended to resume operation of the bridge as a toll bridge.

ODOT denies having had any plans to rebuild the ramp, however, and has not rebuilt the ramp. In his original complaint, Barack alleged that after he purchased the remaining portion of the bridge, ODOT "aborted its plans to build a ramp over State Route 7

in its newly acquired right-of-way obtained especially for the ramp,” and that ODOT would not permit him to build his own ramp. In his unsuccessful attempt to amend his complaint, Barack alleged that he “observed that ODOT did not proceed with its plans to build a new ramp” and that he “then made repeated requests to ODOT over a number of years to grant him permission to build the ramp,” which ODOT did not act on and “neither granted [n]or refused Plaintiffs permission to build a new ramp.” It is difficult to pinpoint exactly when these events or non-events occurred, but all parties appear to operate on the assumption that *if* ODOT had plans to rebuild the ramp after constructing Route 7, such plans were abandoned in the early 1990s. In 1996, Barack assigned all of his interest in the remaining portion of the bridge to co-plaintiff Ohio Midland, Inc.

In November 1998, upon an initial determination that the bridge was an unreasonable obstruction to navigation given that it had long ceased to operate, the United States Coast Guard issued Barack a notice to demolish the bridge and provide demolition plans within 60 days. According to the Coast Guard, Barack “neither submitted demolition plans . . . nor made any attempts to discuss the matter with the Coast Guard.” As a result, on November 14, 2001, the Coast Guard ordered Barack to remove the bridge. Barack did not remove the bridge, and in September 2002 the Coast Guard brought an administrative action against Barack to impose civil penalties, which were imposed by a hearing officer on April 21, 2004. On October 18, 2005, the Coast Guard Commandant affirmed the order to remove the bridge, but reduced Barack’s civil penalties from \$ 598,200 to \$ 300,000 plus interest and costs.

On November 17, 2005, Barack filed a complaint against the Commandant under the Administrative Procedure Act, challenging the Coast Guard's October 18, 2005, decisions (Case No. C2-05-1044). Three weeks later, plaintiffs Barack and Ohio Midland filed another complaint against numerous defendants, including the Commandant (Case No. C2-05-1097).¹ Case 1097 is the case currently before this court. The district court consolidated Cases 1044 and 1097, finding that the cases contained common questions of law and fact. In May 2006, the Commandant filed a motion for voluntary remand in Case 1044 to permit the Coast Guard to conduct a detailed investigation into whether the bridge constitutes an unreasonable obstruction to navigation and to reconsider its decision to impose civil penalties. The district court granted the motion. The court then dismissed the Commandant from Case 1097, the case before this court, on the basis that Barack's claims against the Commandant in Case 1097 were duplicative of his claims in Case 1044.

In Claim One of Case 1097 currently before this court, the plaintiffs alleged that, as successors to IBC, they are entitled to compensation for the damage to the remainder of the bridge caused by ODOT's alleged taking of the ramp. The plaintiffs also claimed that ODOT breached its contract with IBC, and therefore with the plaintiffs, by not providing IBC the salvage materials from the demolition of the ramp (Claim Two), and that ODOT violated the plaintiffs' civil

¹ Named as defendants were Gordon Proctor, Director of ODOT; Jim Spain, Deputy Director of ODOT; Admiral Thomas Collins, U.S. Coast Guard Commandant; Joe Manchin III, Governor of West Virginia; Norfolk Southern Railway; and the Mayor's Office of the City of Benwood, West Virginia.

rights "to construct, maintain, and operate" the bridge because ODOT violated House Bill 11901 by closing the bridge without federal permission (Claims Three and Four). As remedies, the plaintiffs requested the fair market value of the salvage materials, and requested that ODOT be ordered to construct a new ramp and pay damages for loss of toll profits dating from ODOT's removal of the ramp. If ODOT was not ordered to construct a new ramp, the plaintiffs sought to compel ODOT to file appropriation proceedings to determine the amount of damages due to the plaintiffs caused by ODOT's alleged taking of the ramp. The plaintiffs also requested that ODOT be ordered to pay the plaintiffs' civil penalties and cost of bridge removal if the court did not enjoin the Coast Guard's removal order. Finally, the plaintiffs requested in Claim Five that "if Defendants ODOT are not compelled to construct a new ramp . . . and the bridge is deemed abandoned then the remainder of the bridge as a structure should be ordered to revert to the owners of the land," which allegedly includes the State of West Virginia, the City of Benwood, the U.S. Coast Guard, and Norfolk Southern Railway.

Subsequently, West Virginia Governor Joe Manchin III filed a motion to dismiss Claim Five regarding what should happen if the bridge is deemed abandoned, which the district court granted, finding that the claim was "purely conjectural" and therefore not ripe. In response, the plaintiffs filed both a motion for reconsideration of the court's dismissal of Claim Five and a motion for leave to file an amended complaint. Both motions were filed on the same day. The district court interpreted this as an effort to cure the ripeness defect in Claim Five and denied both motions. In considering the plaintiffs' motion for leave

to amend, the court focused entirely on Claim Five, concluding that amendment would be futile because it would not cure the ripeness problem. The court did not address the plaintiffs' proposed amendments to Claims One, Two, Three, Four, or Eight, which, among other things, clarified: that Claims One and Two were takings claims brought pursuant to 42 U.S.C. § 1983; that ODOT employees Proctor and Spain were being sued in their individual capacities; and that Proctor and Spain violated 33 U.S.C. § 491 by deviating from the approved bridge plans without permission from the United States Secretary of Transportation. The plaintiffs subsequently filed a motion for clarification regarding whether the district court intended to deny plaintiffs' motion for leave to amend with respect to all claims, or merely Claim Five.

In the meantime, the district court granted the ODOT defendants' motion to dismiss, concluding that they are shielded from monetary liability by sovereign immunity and that all of the plaintiffs' claims are barred by the applicable statute of limitations. Referring to the plaintiffs' original complaint, the court acknowledged confusion regarding whether Proctor and Spain had been sued in their official or personal capacities:

Plaintiffs admit that their original Complaint did not make explicit allegations of personal liability, so that one might reasonably interpret the Complaint as seeking to impose official liability enforceable against State funds. They seek to clarify their intent in the Proposed Amended Complaint, which has been denied. This Court will, however, consider Plaintiffs'

claims in light of their intent set forth in their Response in Opposition.

JA 382 n.7. Finding that both parties had treated the suit as an official-capacity suit, the court concluded that the plaintiffs' claims were barred by the Eleventh Amendment insofar as they sought money damages. To the extent that the plaintiffs sought prospective relief, the court concluded that the plaintiffs' claims were barred by the applicable statute of limitations. Reasoning that the plaintiffs knew of their injury in 1990-91 at the earliest and in 2001 at the latest, the court concluded that the plaintiffs' claims accrued much longer than two years before suit was initiated in 2005. The court additionally rejected plaintiffs' argument that ODOT's "continued decision" not to rebuild the bridge was a "continuing violation" that tolled the statute of limitations.

In response to the plaintiffs' motion for clarification, the district court clarified in March 2007 that its "November 28, 2006 Order denying leave [to amend] applied to Plaintiffs' *entire* proposed amended complaint, not only to Claim 5." The court offered no elaboration, other than that "Plaintiffs have not thus far submitted a proposed amended complaint that satisfies Rule 15(a) of the Federal Rules of Civil Procedure."

During the course of proceedings, defendant Norfolk Southern Railway had both filed a counterclaim against plaintiffs for breach of contract and moved for summary judgment on that claim. Norfolk Southern's counterclaim alleged that, because IBC was obligated by the Lease Agreement with the Pennsylvania Railroad Company, Norfolk's

predecessor, to "at its own cost and expense . . . ultimately remove [the] bridge and pier and each and every part thereof," the plaintiffs, having assumed for consideration all of IBC's liabilities concerning the bridge, owe an obligation to Norfolk to comply with the terms of the Lease Agreement and have therefore breached the contract by failing to remove the bridge. The district court granted Norfolk Southern's motion for summary judgment, holding that the plaintiffs' contractual duty to remove the bridge had arisen because of the long-term non-use of the bridge, and rejecting plaintiffs' argument that its obligation to remove the bridge had not been triggered because the Coast Guard may ultimately reverse its order to demolish the bridge.

On appeal, the plaintiffs argue that the district court abused its discretion by denying leave to amend Claims One, Two, Three, Four, and Eight against Proctor and Spain, and that the court erred in granting summary judgment to Norfolk Southern on its counterclaim for breach of contract.

II. Motion to Amend

The district court did not abuse its discretion in denying the plaintiffs leave to amend their complaint. Although denial of leave to amend with no accompanying explanation is generally an abuse of discretion, see *Foman v. Davis*, 371 U.S. 178, 182 (1962), failure to provide an explanation is not *per se* an abuse of discretion if, as here, the reasons are readily apparent, see *Troxel v. Manufacturing Co. v. Schwinn Bicycle Co.*, 489 F.2d 968, 971 (6th Cir. 1973); *Miller v. Administrative Office of Courts*, 448 F.3d 887, 898 (6th Cir. 2006). It is clear from the district court's

dismissal of plaintiffs' original claims against the ODOT defendants that the court considered those claims to be time-barred. The court concluded that the applicable statute of limitations had long expired, and rejected plaintiffs' argument that the statute had been tolled on a continuing-violation theory. Although the district court was considering the plaintiffs' claims for prospective relief in so concluding, the plaintiffs' amended claims against Proctor and Spain for damages would fail for the same reason. It is thus readily apparent from the district court's earlier reasoning that leave to amend Claims One, Two, Three, Four, and Eight was denied because the court concluded that amendment would be futile.

Moreover, we agree that amendment of Claims One, Two, Three, Four, and Eight would indeed have been futile.² Because the plaintiffs' amended claims accrued much longer than two years before suit was commenced and do not fall into the "continuing violation" category of claims for which tolling is appropriate, the plaintiffs' amended claims are all barred by the applicable statute of limitations.

The plaintiffs' theory of taking is that a taking occurred because the economic value of the bridge was destroyed. The economic value of the bridge was

² When a district court denies leave to amend on the ground that the proposed amendment would not survive a motion to dismiss, the standard of review is *de novo*. *Greenberg v. Life Ins. Co. of Virginia*, 177 F.3d 507, 522 (6th Cir. 1999). Although the district court did not explicitly provide futility as its reason for denying leave to amend Claims 1, 2, 3, 4, and 8, we review its denial *de novo* in accordance with our conclusion that futility is the reason readily apparent from the record for the denial.

destroyed because the Ohio ramp was not rebuilt, thus effectively closing the bridge. *See* Proposed Amended Complaint ¶¶ 19-20 (“Such closure prevented any use of the Bridge and substantially reduced or destroyed the fair market value of the residue of the Bridge, and constitutes a taking”). Under the plaintiffs’ theory, then, the relevant time that plaintiffs would be “on notice” of the taking is the time they were on notice that they would not be receiving a new ramp. *See Ruff v. Runyon*, 258 F.3d 498, 500 (6th Cir. 2001) (holding that the statute of limitations begins to run under federal law “when plaintiffs knew or should have known of the injury which forms the basis of their claims”); *Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516, 520 (6th Cir. 1997) (“In determining when the cause of action accrues in *section 1983* actions, [courts] have looked to what event should have alerted the typical lay persons to protect his or her rights.”).

According to the plaintiffs, the Ohio ramp was not rebuilt for two reasons: (1) ODOT refused to rebuild the ramp; and (2) ODOT never responded to Barack’s requests to build a new ramp himself. As stated above, although the precise timing is not clear from the record, it is clear that Barack would have been on notice during the early 1990s that ODOT did not intend to rebuild the ramp. Moreover, Barack realistically was on notice that ODOT did not intend to allow him to build his own ramp sometime during the early 1990s, when ODOT is alleged to have repeatedly refused to grant Barack permission to build his own ramp, whether through an outright denial of permission or inaction on his requests. Even giving plaintiffs the benefit of the doubt, Barack was certainly on notice that there would be no new ramp in

1998, when ODOT was prepared to stand by and allow the bridge to be razed following the Coast Guard's demolition order. Consequently, the plaintiffs had reason to know of their injury in the early 1990s, and in 1998 at the latest, and the statute of limitations therefore accrued much longer than two years before plaintiffs commenced suit in 2005. *Owens v. Okure*, 488 U.S. 235, 239-41, 250 (1989) (holding that the statute of limitations for § 1983 claims is the most closely analogous state limitations period for general personal injury claims); *Browning v. Pendleton*, 869 F.2d 989, 992 (6th Cir. 1989) (holding that the analogous Ohio statute is O.R.C. § 2305.10(A), which provides a limitations period of 2 years). The plaintiffs' amended Claims One, Two, Three, Four, and Eight, all stemming from the same events, are therefore time-barred.³

The plaintiffs seek to avoid this conclusion by arguing that, because the ODOT defendants could theoretically have authorized the construction of a new ramp until the Coast Guard finally ordered the bridge's demolition, the plaintiffs' injury did not become permanent, and thus the statute of limitations did not begin to accrue, until October 2005. This argument is unpersuasive. Assuming plaintiffs are correct that the statute of limitations did not begin to accrue until it became clear that their injury was

³ The foregoing statute-of-limitations analysis applies to each of plaintiffs' proposed amended claims (1, 2, 3, 4, and 8). As the ODOT defendants explained, "Plaintiffs' claims are all premised upon actions taken in 1990-1991 regarding the removal of the bridge ramp. This is when they did not receive compensation, it is when they were not allowed to remove salvage materials, and when the bridge was closed without federal permission."

permanent, the relevant inquiry is permanent versus temporary, not physical possibility versus impossibility. On plaintiffs' theory of taking, the time at which the deprivation became "permanent rather than temporary" is determined by ODOT, not by the Coast Guard's actions. After all, the plaintiffs' theory is that ODOT's refusal to build or allow construction of a new ramp has rendered the bridge economically valueless. Regardless of the Coast Guard's actions, the bridge is economically valueless on this theory as long as ODOT maintains its position not to allow construction of a new ramp. Consequently, while it is easy to see how the Coast Guard's order to demolish the bridge renders the bridge's lack of value "permanent," the plaintiffs' injury was "permanent rather than temporary" in the relevant sense when it was clear that ODOT would neither build nor allow construction of a new ramp. As explained above, this occurred in 1998 at the latest.⁴

The plaintiffs also seek to avoid the conclusion that their amended claims are time-barred by arguing that the statute of limitations was tolled because the ODOT defendants' actions or inactions constituted a "continuing violation" that recurred every second the violation was not stopped. This argument is also unpersuasive. Contrary to the plaintiffs' assertions, the fact that Proctor and Spain did not reverse ODOT's early-1990s decisions does not fit into the "continuing violation" framework.

⁴ The plaintiffs also emphasize the finality of the Coast Guard's decision. See Blue Br. 27 ("Simply put, the 1998 notice, 2001 order and 2004 hearing officer decision were not final agency action."). But this does not say when the statute of limitations began to accrue.

Courts have allowed the statute of limitations to be tolled when: (1) "there is some evidence of present [prohibited] activity giving rise to a claim of a continuing violation" and "at least one of the forbidden . . . acts occurs within the relevant limitations period"; or (2) there is a "longstanding and demonstrable policy" of the forbidden activity. *See Trzebuckowski v. City of Cleveland*, 319 F.3d 853, 857 (6th Cir. 2003). This court has distinguished between "continuing violations" and "continuing effects of prior violations," however, and clarified that "the present effects of past discrimination . . . do not trigger a continuing violations exception." *Tenenbaum v. Caldera*, 45 F. App'x 416, 419 (6th Cir. 2002) (citing *Dixon v. Anderson*, 928 F.2d 212, 216 (6th Cir. 1991) (abrogated on other grounds)). And, as the district court noted, courts have been "extremely reluctant to apply [the continuing violations] doctrine outside of the context of Title VII." *LRL Props. v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1105 n.3 (6th Cir. 1995)).

The instant case is not one in which a series of repeated constitutional violations occurred. Rather, one alleged constitutional violation occurred in the early 1990s that simply was not reversed. As the district court explained, the ODOT defendants' alleged "continued decision" not to rebuild the ramp was merely a manifestation of the alleged prior taking.⁵

⁵ The plaintiffs cite *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978), in which this court held that, by imposing a stop order against the plaintiffs' use of property in accordance with a local ordinance, seeking an injunction, defending the appeals of that injunction, and maintaining the stop order throughout the entire course of the litigation, the locality engaged in a "continuing course of action which made it impossible for the plaintiffs to

The plaintiffs' amended claims therefore do not fit within the continuing-violations framework.

That this case does not fall into the "continuing violations" framework also makes sense. If this court were to accept the plaintiffs' theory that a taking is continuous until it is reversed, then all takings would constitute "continuing violations," tolling the statute of limitations. There would effectively be no statute of limitations, and the plaintiffs' theory could easily be extended to many other violations outside of the takings context. This is not the law.

III. Summary Judgment to Norfolk Southern

We also affirm the district court's grant of summary judgment to Norfolk Southern on its counterclaim for breach of contract. The plaintiffs are bound to Norfolk Southern by the Lease Agreement executed between the Pennsylvania Railroad Company and IBC and have a contractual obligation to "ultimately remove" the bridge. The plaintiffs argued before the district court that "performance of the promise to 'ultimately remove' the Bridge is not due at this time because the issue whether it must be

enjoy the full use of their property," thereby tolling the statute of limitations. The instant case is distinguishable in that all Proctor and Spain are alleged to have done is not reverse what plaintiffs consider to be the original taking. Moreover, *Gordon* has been repeatedly distinguished in this and other circuits. See *Kuhnle Bros. v. County of Geauga*, 103 F.3d 516, 521 n.4 (6th Cir. 1997); *Trzebuckowski v. City of Cleveland*, 319 F.3d 853, 858 (6th Cir. 2003); *Cowell v. Palmer Twp.*, 263 F.3d 286, 293 (3d Cir. 2001); *Ocean Acres Ltd. v. Dare County Bd. of Health*, 707 F.2d 103, 106 (4th Cir. 1983).

removed has not been brought finally to the end," noting that the Coast Guard had sought a voluntary remand for further consideration of its orders and that the district court had not yet ruled on the issue of the bridge's removal. The court disagreed. On the district court's reading of the Lease Agreement, "the contract as a whole . . . implies that, once the land is no longer being used for the Bridge, the lessee [plaintiffs] must remove the structure." The court concluded on this basis that plaintiffs' contractual duty to remove the bridge had, indeed, become due, regardless of the Coast Guard's ultimate determination regarding whether the bridge is an unreasonable obstruction to navigation, because "[t]he Bridge has been non-functioning for years," and "the term 'ultimate removal' does not rely on outside determinations" and "[t]he parties' intent, under the plain meaning of the contract, gives no regard to any determinations made by the Coast Guard." Accordingly, the district court concluded that the plaintiffs breached their contract with Norfolk Southern by failing to remove the bridge and ordered Barack to remove it for "the protection and safety of the property owned . . . as well as the protection and safety of the employees, patrons and licensees' of Norfolk." JA 425 (citing the Lease Agreement).

On appeal, the plaintiffs have conceded—both in their briefs and at oral argument—the district court's premise that the Lease Agreement requires them to remove the bridge once it can no longer be used as a bridge: "If [plaintiffs] . . . were granted the injunctive relief they have requested, a new ramp would be built and they would be able . . . to operate the Bridge. They would not have a duty to 'ultimately remove' the portion on and over Norfolk Southern's property, so

long as it remained in operation.” The plaintiffs made similar statements in their reply brief, explaining that if the Coast Guard allows the bridge to stand and the court orders ODOT to allow construction of a new ramp, “then the Bridge can or will still be operable. In that case Ohio Midland and Barack will not have a contractual duty at that time to ‘ultimately remove’ the Bridge because it may still be used as a Bridge.” Because all parties agree that the plaintiffs have a contractual duty to remove the bridge once it can no longer be used as a bridge, it is fair to say—as the district court did—that this duty was triggered sometime in the sixteen years during which the bridge has been inoperable with no reasonable expectation of re-use. This duty in no way hinges on the actions of the Coast Guard.⁶ Consequently, the plaintiffs’ sixteen-year failure to remove the bridge constitutes a breach of contract.⁷

IV. Conclusion

The district court did not abuse its discretion in denying plaintiffs’ motion for leave to amend their complaint and the court properly granted summary judgment to Norfolk Southern on its counterclaim for breach of contract. We therefore affirm.

⁶ For this reason, the plaintiffs’ extended discussion of primary jurisdiction is not on point.

⁷ We do not address the plaintiffs’ arguments concerning mutual mistake of fact and frustration of purpose because these arguments were not raised below.

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

No. C2-05-1097

[Filed March 30, 2007]

OHIO MIDLAND, INC. <i>et al.</i>)
)
Plaintiffs,)
)
v.)
)
GORDON PROCTOR, Director of)
Ohio Department of Transportation, <i>et al.</i> ,)
)
Defendants.)

JUDGE ALGENON L. MARBLEY
Magistrate Judge Abel

OPINION & ORDER

I. INTRODUCTION

This matter comes before the Court on the following motions: (1) Defendant Norfolk Southern Railway Company's ("Norfolk") Motion for Summary Judgment on its counterclaims; and (2) Plaintiffs'

Cross Motion for Summary Judgement on Norfolk's counterclaim for unjust enrichment. For the reasons set forth herein, this Court **GRANTS in part and DENIES in part** Norfolk's Motion for Summary Judgment, and **GRANTS** Plaintiffs' Cross-Motion for Summary Judgment.

II. BACKGROUND

A. Facts¹

On September 12, 1922, the United States Congress enacted House Bill 11901, which authorized the Interstate Bridge Company ("IBC") to construct, operate, and maintain a bridge across the Ohio River to connect the City of Benwood, West Virginia and the City of Bellaire, Ohio. IBC constructed such a bridge, commonly referred to as the "Bellaire Bridge" (hereinafter, the "Bridge") and operated it as a toll bridge until 1990 when the Ohio Department of Transportation ("ODOT"), having the right of appropriation, purchased the existing bridge ramp on the Ohio side of the river from IBC and demolished the ramp for the construction of Ohio Route 7. This action left no physical access to traffic and rendered the Bridge fully inoperable, a state in which it has remained throughout this civil action.

On March 13, 1925, prior to building the Bridge, IBC entered into an agreement with the Pennsylvania

¹ The facts are taken, in large part, from the United States Coast Guard's administrative appellate decision issued on October 18, 2005, which Plaintiffs have appealed in a consolidated case before this Court. See *Roger Barack v. U.S. Coast Guard Commandant*, Case No. C2-05-1044.

Railroad Company ("PRC"), a predecessor to Norfolk, whereby PRC leased to IBC a 16' x 47' tract of land located directly under and immediately surrounding what is now the remaining pier of the Bridge located on Ohio soil (the "Lease Agreement"). Specifically, the Lease Agreement declared that in consideration for an annual payment, PRC "grants to [IBC] the right to construct, maintain, operate, use, renew and remove the [proposed] highway and traction bridge over an across the tracks and property" owned by PRS. The Lease Agreement also specifies that PRC leases such land "throughout and during the period that [IBC] shall use and require the [leased property] for location of its [proposed] pier" and that rights and obligations under the agreement "shall be binding upon the parties hereto, their respective successors and assigns."

The Lease Agreement also addressed the duty to remove the Bridge from the property leased by PRC, now owned by Norfolk: "[IBC] shall at its own cost and expense construct, maintain, renew, and ultimately remove said bridge and pier and each and every part thereof, upon, over and across the tracks and property owned or controlled by [PRC]" In addition, the Lease Agreement grants the lessor PRC the right to remove the Bridge:

It is understood and agreed between the parties hereto that for the protection and safety of the property owned or in possession, custody or control of, as well as the protection and safety of the employees, patrons and licensees of [PRC], [PRC] may in its option at any time . . . do and perform any or all work whether of the original construction, maintenance, repair,

removal or ultimate removal of said bridge, pier. . . in or upon or over the property of [PRC], and in such event may furnish and provide any materials and supplies necessary therefore, and [IBC] covenants and agrees that it will promptly pay or refund the entire cost therefore, plus fifteen percent for overhead to [PRC] upon rendition of proper bills therefore.

On March 22, 1991, Plaintiff Roger Barack ("Barack") and IBC entered into an Asset Purchase and Liability Assumption Agreement ("Purchase Agreement"), whereby IBC transferred, conveyed and assigned to Barack all, or substantially all, of its remaining properties, including the remaining portion of the Bridge. Pursuant to Section 2, Items (B)-(D) of the Purchase Agreement, entitled Assumption of Liabilities, Barack assumed:

[a]ll liabilities or future obligations of [IBC] arising by reason of the ownership of the Bellaire Bridge, including any obligation on the part of [IBC] to demolish, raze and remove the remaining bridge structure . . . and [a]ll future obligations under any validly assigned leases . . . and [a]ll future obligations arising by reason of the ownership of said Bellaire Toll Bridge.

Under Section 4 of the Purchase Agreement, Barack received for his "assumption . . . of the liabilities of [IBC] . . . including any obligation to demolish, raze or remove the said Bellaire Bridge . . . the sum of Seven Hundred Thousand Dollars (\$700,000.00)" Subsequent to the sale of the Bridge to Barack, IBC became defunct.

Norfolk asserts that Plaintiffs, through Barack's Purchase Agreement with IBC, assumed the liabilities set forth in the Lease Agreement originally entered into by IBC and PRC, and that Plaintiffs are, therefore, liable to Norfolk, a successor entity of PRC, to comply with the Lease Agreement. Plaintiffs make no objection to this assertion.

When Barack purchased the Bridge in 1991, he purportedly believed that ODOT planned to reconnect the Ohio side of the Bridge to the main part of the Bridge so that the Bridge could reopen to traffic. Thereafter, in 1996, Barack assigned any and all interest he had in the remaining Bridge assets to co-plaintiff, Ohio Midland, Inc. ("Midland").² In 1997, Barack requested that the State of Ohio rebuild the ramp on Ohio Route 7 in order to allow the Bridge to resume operation as a toll bridge between Ohio and West Virginia. ODOT denied the request and indicated that it would neither reconnect the Bridge in Ohio, nor allow Barack to build a ramp to the Bridge.

In November 1998, because the Bridge had long been inoperable, the U.S. Coast Guard (the "Coast Guard"), upon an initial determination that the Bridge represented an unreasonable obstruction to navigation, issued a "60-Day" letter to Barack, which afforded Barack sixty days to provide the Coast Guard with demolition plans for the Bridge. While the Coast Guard allegedly continued to request demolition plans

² Despite Barack's transfer to Midland, the Deputy Chief who issued the Coast Guard's administrative appellate decision on October 18, 2005, upheld the Hearing Officer's decision that Barack, and not Midland, has been at all relevant times the sole, actual owner of the Bridge.

from Barack – in January of 1999, May of 1999, and June of 2001 – Barack did not respond to the Coast Guard until February 2002, in a correspondence that explained that Barack was “looking for demolition contractors” to satisfy the Coast Guard’s request.

Meanwhile, in April 2001, because Barack had neither provided demolition plans to the Coast Guard nor made any attempts to discuss the matter with the Coast Guard, the Coast Guard’s Bridge Program Administrator requested that the Coast Guard Commandant approve an order to require the removal of the Bridge. The Commandant approved the request and, thereafter, on November 14, 2001, the Coast Guard issued an Order to Barack requiring the removal of the Bridge. On September 25, 2002, after Barack made no effort to begin the removal process, the Coast Guard initiated a civil penalty action. On October 18, 2005 the Coast Guard issued orders for the payment of \$300,000, plus interest and administrative costs, as civil penalties for Barack’s alleged failure to comply with the Coast Guard’s November 14, 2001 order to demolish the Bridge. Barack appealed the Coast Guard’s administrative order, and that case, which is currently pending in Federal Court, has been consolidated with the instant case. *See Roger Barack v. U.S. Coast Guard Commandant*, Case No. C2-05-1044 (hereinafter, *Barack v. Coast Guard*).³

³ On March 6, 2007, upon Motion of the Defendant U.S. Coast Guard Commandment in *Barack v. Coast Guard*, this Court remanded the October 18, 2005 administrative decision so that the Coast Guard may conduct a detailed investigation to determine whether the Bridge is an unreasonable obstruction to navigation.

B. Procedural History

a. Complaint

On December 5, 2006, Barack and Ohio Midland (collectively, "Plaintiffs") filed their Complaint, consisting of eight claims, against the following defendants: (1) Directors of ODOT; (2) Admiral Thomas H. Collins, Commandant of the Coast Guard, ("Collins"); (3) Joe Manchin III, Governor of West Virginia, ("Manchin"); (4) the City of Benwood Mayor's Office, care of Mayor Edward M. Kuca, Jr.; and (5) Norfolk, care of CT Corp. System, its statutory agent. Plaintiffs only asserted one claim – Claim 5 – against Defendants Norfolk, Benwood, and Manchin. Claim 5 stated that, should the Court chose not to grant Plaintiffs' previously stated claims, (Claims 1-4), which demanded that ODOT rebuild the ramp or pay Plaintiffs for an "unconstituional taking," then the Court should alternatively find the Bridge "abandoned" by Plaintiffs, and conclude that, pursuant to Ohio and West Virginia laws, the remainder of the Bridge would revert to the owners of the land. Plaintiffs asserted Claim 5 against Defendants Manchin, Benwood, the Collins, and Norfolk on the basis that the State of West Virginia, the City of Benwood, the U.S. Coast Guard, and Norfolk may each have a propriety interest in the land upon which the Bridge is built and may, therefore, be responsible for its removal.

B. Defendant Norfolk's Motion for Summary Judgment

On April 26, 2006, Norfolk filed a Motion for Leave to File an Amended Answer and Counterclaim, which

the Court granted. In its counterclaims, Norfolk asserts the following: (1) Barack is contractually responsible, through the Lease Agreement originally entered into by IBC and PRC, and subsequently assigned to Barack through the IBC and Barack Purchase Agreement, for the removal of the Bridge; (2) Barack has breached the contract by failing to do so; and (3) Barack has been unjustly enriched by \$700,000, the amount paid to him by IBC for his assumption of the liabilities and obligations associated with the Bridge, because he spent the money on "other projects" instead of using it to remove the Bridge. Norfolk asks the Court to require Plaintiff Barack to "raze, demolish, and remove" the Bridge, or, in the alternative, pay damages in an amount sufficient to compensate Norfolk for the continued refusal of Barack to remove the structure. Norfolk filed a Motion for Summary Judgment on these counterclaims on April 26, 2006.

c. Dismissal of Norfolk as a Defendant

On June 13, 2006, after Norfolk filed its Counterclaim and Motion for Summary Judgment, this Court granted a Motion to Dismiss filed by Defendant Manchin, finding that Plaintiffs' Claim 5 is contingent upon the outcome of Claims 1 through 4, and thus not ripe for review. Because Claim 5 was the only action brought against Defendants Manchin, Benwood, and Norfolk, this Court also dismissed them as defendants in this matter.

The Court's decision to dismiss Norfolk as a defendant, however, did not render moot Norfolk's Motion for Summary Judgment on its counterclaims against Plaintiff Barack, and Norfolk demonstrated

affirmatively its desire to pursue such counterclaims. Plaintiffs filed a Response in Opposition to Norfolk's Motion for Summary Judgment on June 29, 2006, and Norfolk filed its Reply on July 14, 2006. Accordingly, Norfolk's Motion for Summary Judgment is now ripe for this Court's review.

On August 2, 2006, Plaintiffs filed a Cross-Motion for Summary Judgment on Norfolk's Counterclaim for unjust enrichment. Norfolk did not file a Response in Opposition, and the briefing deadlines have passed. Accordingly, Plaintiff's Cross-Motion for Summary Judgment is now ripe for this Court's review.

III. STANDARD OF REVIEW

Summary judgment is appropriate "[i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "[S]ummary judgment will not lie if the dispute is about a material fact that is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); see *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (concluding that summary judgment is appropriate when the evidence could not lead the trier of fact to find for the non-moving party).

The standard of review for cross-motions of summary judgment does not differ from the standard applied when a motion is filed by only one party to the litigation. *Taft Broad. Co. v. U.S.*, 929 F.2d 240, 248

(6th Cir. 1991). "The fact that both parties have moved for summary judgment does not mean that the court must grant judgment as a matter of law for one side or the other; summary judgment in favor of either party is not proper if disputes remain as to material facts. Rather, the court must evaluate each party's motion on its own merits. . . ." *Id.* (citations omitted).

In evaluating motions for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). In the case of cross-motions, the Court must "tak[e] care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Taft*, 929 F.2d at 248. The movant has the burden of establishing that there are no genuine issues of material fact, which may be accomplished by demonstrating that the non-moving party lacks evidence to support an essential element of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1388-89 (6th Cir. 1993). Significantly, in responding to a motion for summary judgment, however, the non-moving party "may not rest upon its mere allegations . . . but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P.56(e); see *Celotex*, 477 U.S. at 324; *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994).

The non-moving party must present "significant probative evidence" to show that there is more than "some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos.*, 8 F.3d 335, 339-40 (6th Cir. 1993). Furthermore, the mere existence of a scintilla of evidence in support of the non-moving

party's position will not be sufficient; there must be evidence on which the jury could reasonably find for the non-moving party. *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995) (citing *Anderson*, 477 U.S. at 252).

IV. ANALYSIS

Defendant/Counterclaim Plaintiff Norfolk urges this Court to grant Summary Judgment on its Counterclaims against Plaintiff/Counterclaim Defendant Barack.⁴ In Claim I, Norfolk alleges that Barack breached his contract with Norfolk, and is responsible for razing, demolishing, and removing the remaining Bridge structures located in the State of Ohio and on and within property owned by Norfolk. In Claim II, Norfolk contends that because Barack received \$700,000 from IBC for the specific purpose of demolishing the Bride and has thus far refused to do so, Barack has been unjustly enriched at the expense of Norfolk.

Barack and Midland, conversely, have asked this Court to grant Summary Judgment in their favor on Norfolk's unjust enrichment claim. In addition, Barack and Midland assert that the Court should deny Norfolk's Motion for Summary Judgment on Claim I, because there is a genuine issue of material fact as to whether Barack has breached the Lease Agreement between the parties.

⁴ For the sake of clarity, the Court will refer to the parties by their proper names, instead of by their role in the litigation.

A. Count I: Breach of Contract

Norfolk contends that Barack has a contractual duty under the Lease Agreement originally entered into by IBC and PRC to remove the remaining Bridge structure from Norfolk's property. Because Barack has not done so, Norfolk asserts, he has breached the contract. Norfolk seeks an order from this Court requiring that Barack remove the remaining Bridge structure, or in the alternative, pay Norfolk damages, in an amount ("to be proven at trial") sufficient to compensate Norfolk for Barack's continual refusal to remove the structures. Barack and Midland assert that there is a genuine issue of material fact as to whether Barack has breached the Lease Agreement.

As Norfolk's counterclaims are based on state contract law, this Court will apply the substantive law of Ohio. "Under Ohio law, if the language of a contract is clear and unambiguous, a court may not resort to construction of that language." *Medical Billing, Inc. v. Medical Mgmt. Sciences, Inc.*, 212 F.3d 332, 336 (6th Cir.), *reh'g and sugg. for reh'g en banc denied*, (2000) (citing *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, 64 Ohio St. 3d 657, 665, 597 N.E.2d 1096, 1102 (1992), *cert. denied*, 507 U.S. 987, (1993)). Ambiguity in the contract exists only when a term cannot be ascertained from the four corners of the contract, or when the contract language is susceptible to two or more reasonable interpretations. See *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 818 (6th Cir.) *reh'g and sugg. for reh'g en banc denied*, (1999) (interpreting Ohio law). A contract is not ambiguous simply because the enforcement of its terms will cause hardship to one of the parties. See *New Market Acquisitions, Ltd., v. Powerhouse Gym*, 154 F. Supp. 2d 1213, 1218 (S.D.

Ohio 2001); *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Auth.*, 78 Ohio St. 3d 353, 362, 678 N.E.2d 519, 526 (1997).

The primary purpose for judicial construction of an unambiguous contract is to ascertain and effectuate the intent of the parties. *See Aultman Hosp. Ass'n v. Cmty. Mut. Ins. Co.*, 46 Ohio St. 3d 51, 53, 544 N.E.2d 920, 923 (1989). If the terms of the contract are clear, the court shall presume that the parties' intent rests in the language of the agreement, and "the court shall apply the terms, not interpret them." *New Market Acquisitions*, 154 F. Supp. 2d at 1219 (citing *Foster Wheeler Enviresponse, Inc.*, 78 Ohio St. 3d at 361, 678 N.E.2d at 526; *GenCorp, Inc.*, 178 F.3d at 817-18).

Additionally, the interpretation of a written agreement is a matter of law for the court. *See Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 652 N.E.2d 684, 686 (1995). A question of fact for the jury arises only if the court determines that a contract term is ambiguous. *See GenCorp, Inc.*, 178 F.3d at 818 (interpreting Ohio law). Finally, a writing executed as part of the same transaction shall be read as a whole, and the intent of each section shall be ascertained from a consideration of the whole. *Foster Wheeler Enviresponse, Inc.*, 78 Ohio St.3d at 361, 678 N.E.2d at 526.

The Lease Agreement in this case states that the land will be leased "throughout and during the period that [the lessee] shall use and require the [leased property] for location of its [proposed] pier." The agreement provides that the lessee (here, Barack) must, at his own cost and expense, "construct, maintain, repair, renew, and ultimately remove" the

Bridge and its structures from the land owned by the lessor (here, Norfolk). Additionally, the agreement states that the lessor may "in its option at any time" perform the construction, maintenance, repairs or "ultimate removal" of the Bridge and the lessee is responsible for refunding the lessor, plus fifteen percent. This Court finds that the language contained in Lease Agreement is clear and unambiguous. As such, the Court can interpret the terms of the agreement as a matter of law; there is no question of fact for the jury.

The express terms of the Lease Agreement indicate that Barack agreed, pursuant to his assumption of the Lease Agreement under the IBC-Barack Purchase Agreement, to remove the Bridge or pay damages to Norfolk. Under the clear terms of the contract, no reasonable jury could determine that Barack still uses or requires the leased property, as anticipated by the contracting parties, because: (1) the Bridge has not been operable as "highway and traction bridge" in over sixteen years; (2) ODOT has determined that it will not rebuild the Bridge ramp, nor will it allow Plaintiffs to do so;⁵ and (3) the Coast Guard has repeatedly ordered Barack to remove the Bridge.

Barack contends that he has breached the Lease Agreement only if he has failed to perform the promise to "*ultimately* remove" the Bridge, and that a jury

⁵ Plaintiffs, of course, named ODOT officials in their original complaint, seeking a court order requiring ODOT officials to rebuilt the ramp or pay Plaintiffs for an "unconstitutiona taking." The ODOT Defendants filed a Motion to Dismiss Plaintiffs claims, which this Court granted on December 28, 2006, thereby dismissing them as defendants in this matter.

could find that the performance of the promise to “ultimately remove” the Bridge has not yet become due. Specifically, Barack argues that because the Coast Guard’s October 18, 1005 administrative order has been remanded (pursuant to the Coast Guard’s Motion for Voluntary Remand in the consolidated action, *Barack v. Coast Guard*), the Coast Guard may determine that the Bridge is *not* an unreasonable waterway obstruction after all. In such a situation, Plaintiffs argue, Barack’s contractual duty to “ultimately remove” the Bridge will not be ripe because there remains an opportunity to operate the Bridge if ODOT rebuilds the ramp or allows Plaintiff to rebuild the ramp.

This Court is not persuaded by Plaintiffs’ argument. Barack’s contractual duty under the Lease Agreement to “ultimately remove” the Bridge does not in any way depend on the Coast Guard’s determination of whether the Bridge structure is an unreasonable obstruction to navigable waters. The parties’ intent, under the plain meaning of the contract, gives no regard to any determinations made by the Coast Guard. In reading the contract as a whole, the term “ultimate removal” does not rely on outside determinations, but simply implies that, once the land is no longer being used for the Bridge, the lessee must remove the structure. Indeed, the Agreement allows for the lessor to “ultimately remove” the Bridge “*in its option at any time*,” if “ultimate” relied out outside findings by the Coast Guard or any other party, the lessor would not be able to remove the structure “*in its option at any time*.”

The purpose of the Lease Agreement – to provide land to the lessee for its “highway and traction” Bridge

– has been fulfilled. The Bridge has been non-functioning for years, and under the agreement “for the protection and safety of the property owned . . . as well as the protection and safety of the employees, patrons and licensees” of Norfolk, Barack must now remove it. Accordingly, the Court **GRANTS** Defendant’s Motion for Summary Judgment as to Count I and hereby orders Plaintiff Barack to comply with the terms of the Lease Agreement.

B. Count II: Unjust Enrichment

Norfolk asserts that because Barack received \$700,000 for assuming the obligations and liabilities with respect to the Bridge, including any destruction costs, but has not satisfied his removal duty, Barack has been unjustly enriched “at the expense of Norfolk Southern, which still bears the burden of that non-functional pier and bridge remaining on and over their property.”

To prevail on a claim of unjust enrichment, a party must prove: “(1) a benefit conferred by a plaintiff upon a defendant, (2) knowledge by the defendant of the benefit, and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment (‘unjust enrichment’).” *Foley v. Am. Elec. Power*, 425 F. Supp. 2d 863, 875 (S.D. Ohio 2006) (quoting *Hambleton v. R.G. Barry Corp.*, 12 Ohio St. 3d 179 (1984)).

Under the doctrine of unjust enrichment, if the plaintiff did not confer the asserted benefit upon the defendant, the plaintiff is not entitled to judgment for unjust enrichment. *Id.* (“a benefit conferred by a plaintiff upon a defendant”); *Miller v. Keybank Nat’l*.

Ass'n., 2006 WL 871621 at *8 (Ohio Ct. App. Apr. 6, 2006). In *Miller*, the son of a trustor sued the defendants for unjust enrichment after the trustor gave the defendants a portion of the trust property without exchange of consideration. The court noted that the son *himself* did not confer any benefit to the defendants, and therefore, summary judgment on the unjust enrichment claim was granted in favor of the defendants.

In this case, Norfolk asserts that the benefit conferred upon Plaintiffs is a payment of \$700,000 to Barack. That payment, which Barack does not dispute, was made pursuant to the Purchase Agreement between Barack and IBC. Barack received \$700,000 for assuming IBC's liabilities and obligations, including removal costs, relating to the Bridge. Norfolk was not in any way a party to the Purchase Agreement and did not contribute to the \$700,000 payment to Barack. In other words, Norfolk was not the party to confer the benefit on Barack. Norfolk has failed to establish that there is no genuine issue of material fact as to the first element of unjust enrichment – that a benefit was conferred by the plaintiff upon a defendant. In fact, Norfolk altogether fails to state a claim for unjust enrichment. Further, as stated below, Barack and Midland have established that there is no genuine issue of material fact that Norfolk *was not* the party to confer the benefit on Barack. Therefore, it is Plaintiffs, not Norfolk, who are entitled to Summary Judgment as a matter of law. Norfolk's Motion for Summary Judgment on Claim II is **DENIED**.

**C. Plaintiffs' Cross-Motion
for Summary Judgment**

Plaintiffs not only ask this Court to deny Norfolk's Motion for Summary Judgment on the issue of unjust enrichment, but also urge this Court to grant Plaintiffs' Motion for Summary Judgment on the same claim because there is no genuine issue of material fact about whether Plaintiffs were unjustly enriched by *Norfolk*. Because Norfolk has failed to offer any evidence to establish this element of unjust enrichment—indeed, Norfolk states that the Barack was unjustly enriched by IBC—there is no genuine issue of material fact as to whether Plaintiffs were unjustly enriched by Norfolk. Indeed, Plaintiffs were not. Therefore, Plaintiffs' Motion for Summary Judgment is **GRANTED**.

V. CONCLUSION

For the foregoing reasons, Counterclaim Plaintiff Norfolk's Motion for Summary Judgment is **GRANTED** with respect to Claim I and **DENIED** with respect to Claim II. In addition, Counterclaim Defendants Barack's and Midland's Cross-Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

s/Algenon L. Marbley
ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

DATED: March 30, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

No. C2-05-1097

[Filed March 30, 2007]

OHIO MIDLAND, INC., et al.)
)
Plaintiffs,)
)
v.)
)
GORDON PROCTOR, Director of)
Ohio Department of Transportation, <i>et al.</i> ,)
)
Defendants.)
)

JUDGMENT IN A CIVIL CASE

JUDGE ALGENON L. MARBLEY
Magistrate Judge Abel

[] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

[X] Decision by Court. This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED That the Court **GRANTS** Counterclaim Plaintiff Norfolk's Motion for Summary Judgment with respect to Claim I and **DENIES** with respect to Claim II. In addition, Counterclaim Defendants Barack's and Midland's Cross-Motion for Summary Judgment is **GRANTED** pursuant to the March 30, 2007 Opinion and Order. This action is hereby **DISMISSED**.

Date: **March 30, 2007**

James Bonini, Clerk

s/Betty L. Clark
Betty L. Clark/Deputy Clerk

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

No. 2:05-cv-01097-ALM-MRA

[Filed March 30, 2007]

OHIO MIDLAND, INC., <i>et al.</i>)
)
Plaintiffs,)
)
v.)
)
GORDON PROCTOR, DIRECTOR,)
OHIO DEPARTMENT OF)
TRANSPORTATION, <i>et al.</i>)
)
Defendants.)

JUDGE ALGENON L. MARBLEY
Magistrate Judge Abel

OPINION AND ORDER

I. INTRODUCTION

This matter comes before the Court on a Motion to Dismiss filed by Defendant Admiral Thomas H. Collins, Commandant, United States Coast Guard (the

"Defendant"). For the reasons set forth herein, the Court **GRANTS** Defendant's Motion to Dismiss.

II. BACKGROUND

A. Facts¹

On September 12, 1922, Congress enacted House Bill 11901, which permitted the construction, maintenance, and operation a bridge over the Ohio River, connecting Bellaire, Ohio and Benwood, West Virginia (hereinafter, the "Bridge"). The Bill incorporated by reference 33 U.S.C. § 491 in which Congress expressly reserved to itself the right to alter, amend, or repeal its authorization:

When, after March 23, 1906, authority is granted by Congress to any persons to construct and maintain a bridge across or over any of the navigable waters of the United States, . . . and when the plans for any bridge to be constructed under [this] title, have been approved by the Secretary it shall not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such plans has previously been submitted to and received the approval of the Secretary.

33 U.S.C. § 491.

¹ Because the matter before the Court is Defendant's Motion to Dismiss, the Court will consider the facts in the light most favorable to Plaintiffs. *McGee v. Simon & Schuster, Inc.*, 154 F. Supp. 2d 1308, 1310 (S.D. Ohio 2001).

The Interstate Bridge Company ("IBC") constructed, operated, and maintained the bridge as a toll bridge until 1991, at which time the Ohio Department of Transportation ("ODOT"), having the right of appropriation, purchased the existing bridge ramp on the Ohio side of the river from IBC and demolished the ramp for the construction of Ohio State Route 7. On March 22, 1991, Plaintiff Roger Barack ("Barack") purchased the remaining portions of the Bridge from IBC, and all assets and liabilities associated with the Bridge were assigned to him.²

When Barack purchased the Bridge, he purportedly believed that ODOT planned to reconnect the Ohio side of the Bridge to the main part of the Bridge, by building a new ramp over State Route 7, so that the Bridge could reopen to traffic. ODOT later decided, however, that it would neither reconnect the Bridge in Ohio, nor allow Barack to build a ramp to the Bridge. Thereafter, Barack assigned any and all interest he had in the remaining Bridge assets to co-plaintiff, Ohio Midland, Inc. ("Ohio Midland"), a corporation solely owed and controlled by Barack.

In November 1998, years since the Bridge had been operable, the U.S. Coast Guard (the "Coast Guard"), upon an initial determination that the Bridge represented an unreasonable obstruction to navigation, issued a "60-Day" letter to Barack, which afforded Barack sixty days in which he must provide the Coast Guard with demolition plans for the Bridge.

² Under the Purchase Agreement between Barack and IBC, Barack received \$700,000 for his assumption of liabilities associated with the Bridge.

Barack never provided such plans, and on November 14, 2001, the Coast Guard issued a formal Order requiring the removal of the Bridge. After Barack made no effort to begin the removal process, the Coast Guard initiated a civil penalty action. On October 18, 2005 the Coast Guard issued orders for the payment of \$300,000, plus interest and administrative costs, as civil penalties for Barack's alleged failure to comply with the Coast Guard's November 14, 2001 order to demolish the Bridge.

On November 17, 2005, Barack appealed the Coast Guard's administrative order, and that case, which is currently pending in Federal Court, has been consolidated with the instant case. See *Roger Barack v. U.S. Coast Guard Commandant*, Case No. C2-05-1044 (hereinafter, "*Barack v. Guard*"). In that case, Barack argues, among other things, that: (1) the Coast Guard lacks jurisdiction to order the removal of the Bridge; and (2) the Coast Guard erred in determining legal ownership or operational responsibilities of the Bridge and failed to apply state law regarding Bridge ownership; and (3) the Coast Guard's orders are "erroneous, unconstitutional, arbitrary, capricious, unreasonable, an abuse of discretion beyond the powers of Congress and were rendered without substantial evidence and [Barack] was deprived due process of law." Upon Motion of the Defendant Coast Guard Commandment in such case, this Court remanded the administrative decision so that the Coast Guard may conduct a detailed investigation to determine whether the Bridge is an unreasonable obstruction to navigation.

B. Procedural History

On December 5, 2005, Plaintiffs Barack and Ohio Midland (collectively, "Plaintiffs") filed their initial complaint (the "Complaint") against Defendant Collins and several other defendants including the Ohio Department of Transportation ("ODOT"). In sum, Plaintiffs ask the Court to order ODOT officials to rebuild the ramp on the Ohio-side of the river, or pay for what Plaintiffs allege is an unconstitutional taking. In the alternative, Plaintiffs ask the Court to declare that the Bridge has been abandoned and is, therefore, now owned by entities having ownership interest in the land upon which the Bridge and its piers sit.

Plaintiffs bring two of their eight claims against Defendant – Claim 6 and Claim 8. Plaintiffs assert Claim 6 in the alternative to the claims stated against ODOT officials. Plaintiffs claim that the Bridge has been abandoned and that the remaining Bridge structure has reverted to the owners of the land; therefore, the Coast Guard should be enjoined from ordering Plaintiffs to remove the Bridge or to pay penalties for Plaintiffs' alleged failure to remove the remainder of the Bridge. In Claim 8, Plaintiffs claim that the Coast Guard has no jurisdiction over the Bridge because the authorization for the Bridge's existence lies with Congress, and Congress reserved its authority over the Bridge in the 1922 House Bill. Claim 8 also states that even if the Coast Guard has jurisdiction over the Bridge, the Court must interpret whether this jurisdiction extends beyond the high water mark, as the Coast Guard claims, to include ramps leading to the Bridge. Plaintiffs request that the Coast Guard be enjoined from ordering Plaintiffs to remove the Bridge and from assessing Plaintiffs a

penalty, interest and administrative costs regarding any order of removal.

On May 11, 2006, Defendant filed the instant Motion to Dismiss pursuant to 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Defendant contends that because Plaintiffs failed to identify any waiver of sovereign immunity, this Court is not permitted to take subject matter jurisdiction over the action. Defendant also asserts that Plaintiffs bring duplicate claims against Defendant because Plaintiffs assert the same claims against Defendant in *Barack v. Guard*, the appeal of the Coast Guard's administrative order, and, therefore, no relief can be granted with respect to this action. On June 29, 2006, Plaintiffs filed a Response to Defendant's Motion to Dismiss, which asserts that both claims are asserted against Defendant in his personal capacity.³ Defendants replied on July 6, 2006. Accordingly, Defendants' Motion is now ripe for this Court's review.

III. STANDARD OF REVIEW

When a defendant seeks dismissal under both Rules 12(b)(1) and 12(b)(6), the Court must consider the Rule 12(b)(1) motion first, because the Rule 12(b)(6) motion will become moot if the Court lacks

³ On that same day, Plaintiffs also filed a Motion for Leave to Amend their Complaint and referred to their Proposed Complaint throughout their Response to Defendants' Motion to Dismiss. This Court, however, denied Plaintiffs' Motion for Leave to Amend on November 28, 2006, thereby rejecting the Proposed Complaint. Therefore, the Court will refer to Plaintiffs' original complaint in its analysis of Defendants' Motion to Dismiss.

subject matter jurisdiction. *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990).

A. Subject Matter Jurisdiction

Defendant contends that dismissal is warranted under FED. R. CIV. P. 12(L)(1), which enables a defendant to raise by motion the defense of "lack of jurisdiction over the subject matter." When a defendant argues that the plaintiff has not alleged sufficient facts in the complaint to establish subject matter jurisdiction, the court takes the allegations in the complaint as true. *Nichols v. Muskingum College*, 318 F.3d 674, 677 (6th Cir. 2003). Conversely, when facts presented to the district court give rise to a factual controversy, no presumptive truthfulness applies, and the court must, therefore, weigh the conflicting evidence to arrive at the factual predicate that subject matter jurisdiction exists or does not exist. *Ohio National Life Insurance Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). In considering such a motion, the court has wide discretion to consider evidence outside the pleadings to resolve disputed jurisdictional facts. *Nichols*, 318 F.3d at 677. The plaintiff bears the burden of proving jurisdiction. *Rogers v. Stratton Indus.*, 798 F.2d 913, 915 (6th Cir. 1986).

B. Failure to State a Claim

The purpose of a Rule 12(b)(6) Motion to Dismiss is to test the sufficiency of the complaint. *Davis II. Elliot Co., Inc. v. Caribbean Utils. Co.*, 513 F.2d 1176, 1182 (6th Cir. 1975). When considering such motion, a court must construe the complaint in the light most favorable to the plaintiff and accept as true all "factual

allegations and permissible inferences therein.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Legal conclusions framed as factual allegations, however, are accorded no such presumption. *Lewis v. ACB Bus. Serv., Inc.* 135 F.3d 389, 405 (6th Cir. 1998). A complaint should not be dismissed under Rule 12(b)(6) “unless it appears beyond doubt that the [p]laintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 724 (6th Cir. 1996) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). The court’s focus is on whether the plaintiff is entitled to offer evidence to support the claims, and not on whether the plaintiff will ultimately prevail. *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995). “Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.” *Id.*

A plaintiff need not include all of the particularities of the claim against the defendant in order to survive a 12(b)(6) motion. *Brooks v. Am. Broad. Co., Inc.*, 932 F.2d 495, 497 (6th Cir. 1991). Pursuant to the Federal Rules of Civil Procedure, the complaint need only set forth the basis of the court’s jurisdiction, a short and plain statement of the claim entitling the plaintiff to relief, and a demand for judgment. See FED. RULE CIV. PRO. 8(a). A court will grant a motion for dismissal under 12(b)(6) only if there is an absence of law to support a claim of the type made or of facts sufficient to make a valid claim, or if on the face of the complain there is an insurmountable bar to relief indicating that the plaintiff does not have a claim. *Cnty. Mental Health Serv. v. Mental Health and Recovery Bd.*, 395 F. Supp. 2d 644, 649 (S.D. Ohio 2004).

IV. ANALYSIS

Defendant urges this Court to dismiss Plaintiffs' complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. Defendant claims this Court lacks subject matter jurisdiction to review any Coast Guard action outside the parameters of reviewing the administrative order already challenged in *Barack v. Guard*. Additionally, Defendant maintains that Plaintiffs' claims against Defendant in the instant matter simply duplicate substantive claims set forth in *Barack v. Guard*, and should be dismissed for failure to state a claim upon which relief can be granted.

A. Subject Matter Jurisdiction

Defendant argues that this Court lacks subject matter jurisdiction over Plaintiffs' claims – aside from reviewing Barack's challenge to the final agency action in the October 18, 2005 administrative decision – because Defendant is protected by sovereign immunity. Plaintiffs asserts that their claims are not barred by sovereign immunity because: (1) Plaintiffs' claims are not asserted against the United States, but instead are asserted against Defendant in his personal capacity for acting outside the scope of his lawful authority; and (2) Plaintiffs' claims seek review of final agency action, and therefore Congress has waived any sovereign immunity Defendant may enjoy with respect to those claims.

i. Sovereign Immunity

The United States, its agencies, and its officials acting in their official capacity can be sued only to the

extent that Congress consents by waiving sovereign immunity, and Congress's consent defines a court's jurisdiction to hear the suit. See *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999); *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Hawaii v. Gordon*, 373 U.S. 57, 58 (1963). When jurisdictional facts are challenged, the party claiming jurisdiction bears the burden of demonstrating that the court has jurisdiction over the subject matter. *Ohio National Life Insurance*, 922 F.2d at 324. Accordingly, in order to proceed against the United States or one of its agents, the plaintiff must identify a waiver of sovereign immunity in his complaint; otherwise, the claim must be dismissed for lack of subject matter jurisdiction. *Reetz v. United States*, 224 F.3d 794, 795 (6th Cir. 2000).

In this case, Plaintiffs allege that this is not a suit against the United States, its agencies, or officials acting in their official capacity, but one against Defendant in his personal capacity for "acting outside the scope of his lawful authority," and that, in any event, sovereign immunity has been waived by Congress. Defendant alleges that sovereign immunity has not been waived, and that at all times, he acted in his official capacity, pursuant to statutory authority under 33 U.S.C. § 502, to order removal of unreasonably obstructive bridges over navigable waterways and to assess penalties for noncompliance. This is a factual dispute; therefore, no presumptive truthfulness applies to Plaintiffs' jurisdictional factual allegations in the Complaint. *Ohio National Life Insurance*, 922 F.2d at 325.

Regardless of the manner by which a plaintiff designates an action,⁴ a suit is regarded as an official capacity suit (i.e., a suit against the sovereign) if “the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,” or if the effect of the judgment would be to “restrain the Government from acting, or to compel it to act.” *Dugan v. Rank*, 372 U.S. 609, 620 (1963). In other words, to determine whether a suit is brought against an official in his personal or official capacity, the court must ask whether, by obtaining relief against the official, the plaintiff will in effect obtain relief against the sovereign. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949). If relief is, in effect, obtained against the sovereign, the suit is barred because it is, in substance, a suit against the Government over which the court, in the absence of consent, has no jurisdiction. *Id.*

If an officer acts as an individual and not as an official, however, a suit directed against the official in his personal capacity is not a suit against the sovereign. *Larson*, 337 U.S. at 689. For example, where the officer’s powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions because he is not conducting the business that the sovereign empowered him to do, or he is doing so in a way which the sovereign has forbidden. *Id.*

⁴ Plaintiffs do not state that they are suing Defendant in his personal capacity in their Complaint, but do so in their proposed amended complaint, which was denied by the court. The Court is aware, however, of Plaintiffs’ characterization of the suit, however, through Plaintiffs Response filed in Opposition to the instant Motion to Dismiss.

It is a prerequisite to the maintenance of any action against an agency of the sovereign, as in any other suit, for specific relief that the plaintiff claim an invasion of his legal rights, either past or threatened. *Larson*, 337 U.S. at 693. In addition, the action to be restrained or directed must not be an action of the sovereign. *Id.* If the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded actions of a private principal under the normal rules of agency. *Id.* at 695. The actions of an officer of the sovereign can be regarded so "illegal" as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void. *Id.*

This Court observes that, while Plaintiffs state their intention to sue Defendant in his personal capacity in their Response to Defendant's Motion to Dismiss, upon careful review of the pleadings, it is clear, as a matter of law, that Defendant was not acting in his personal capacity, and that, therefore, any relief obtained through this suit would come from the sovereign itself. The parties themselves have treated this case as an official capacity suit, despite Plaintiffs' characterization, and in the interest of justice, substance regularly trumps form.

First, Plaintiffs named Defendant only by way of his position with the Coast Guard: "Defendant Admiral Thomas H. Collins Commandant U.S. Coast Guard." The Complaint proceeds with references to "Defendant U.S. Coast Guard" – an agency of the United States

Government – but there are no allegations of any conduct by Defendant. For example, in Claim 6, Plaintiffs request that the Court enjoin “Defendant U.S. Coast Guard” from ordering Plaintiffs to remove the Bridge or to pay penalties for Barack’s alleged failure to remove the remainder of the bridge structure. Plaintiffs use similar language in Claim 8, which identifies the defendant as “Defendant U.S. Coast Guard,” and not Admiral Collins in his personal capacity. Second, neither Defendants’ Motion nor their Reply raise any personal capacity defense (such as qualified immunity), but only official capacity defenses (such as sovereign immunity). *See, e.g., Pinaud v. County of Suffolk*, 52 F.3d 1139 (2d Cir. 1995) (holding that, where the complaint was unclear, plaintiffs’ request for punitive damages, along with defendants’ summary judgment motion on absolute immunity grounds suggested that the parties believed that the action was a personal capacity suit).

Plaintiffs argue that Claim 6 is aimed at Defendant Collins in his personal capacity and he should be enjoined from ordering Plaintiffs to remove the Bridge or to pay civil penalties for their alleged failure to remove the Bridge, and from permitting any Coast Guard personnel to so order the Plaintiffs. Plaintiffs contend that if the Bridge has been abandoned, and they are no longer the owners of the Bridge, then it is beyond the scope of Defendant’s lawful authority to order, or permit any Coast Guard personnel to order, Plaintiffs to remove the Bridge or pay civil penalties for an alleged failure to remove the Bridge.

Essentially, Plaintiffs seek to restrain the Coast Guard and its personnel from ordering it to remove the Bridge as well as to restrain the Coast Guard from

forcing Plaintiffs to pay civil penalties. A judgment in favor of Plaintiffs would have the effect of restraining the U.S. Government from acting. If the effect of the judgment in a suit would be "to restrain the Government from acting, or compel it to act," it is a suit against the sovereign. *Dugan v. Rank*, 372 U.S. 609, 620 (1963). Plaintiff's action against Defendant is, therefore, in effect, a suit against the sovereign.

Additionally, under 33 U.S.C. § 502, the Commandant of the Coast Guard has authority to order removal of unreasonably obstructive bridges over navigable waterways and to assess civil penalties for noncompliance. See 33 U.S.C. § 502. If the actions of Defendant do not conflict with his statutory authority, he is acting on behalf of the U.S. Coast Guard, and therefore acting on behalf of the sovereign. Defendant ordered Plaintiffs to remove the Bridge and pay civil penalties pursuant to his authority to adjudicate matters of the Coast Guard and to issue and enforce Administrative Orders. Defendant was, therefore, not acting outside of the scope of his authority when he order Plaintiffs to remove the Bridge.

Defendant was acting in his official capacity in ordering Plaintiffs to remove the Bridge and in imposing fines. These actions were the actions of the sovereign. Plaintiffs' assertion that their suit is against Defendant in his personal capacity fails. As a result, this Court may only have jurisdiction over the claims in this case to review a final agency action pursuant to the Administrative Procedure Act.

Notwithstanding Plaintiffs' characterization, this Court concludes that this action is not one against Defendant in his personal capacity, but against

Defendant in his official capacities as Commandant of the Coast Guard. Plaintiffs do not allege personal involvement of Defendant; the parties themselves treated Plaintiffs' Complaint as an official capacity suit; and Defendant acted pursuant to his statutory authority when ordering the removal of the Bridge. Such action is barred by sovereign immunity unless the government has consented to suit. As discussed above, official capacity suits are barred by sovereign immunity unless the government has consented to suit.

ii. Final Agency Action

Plaintiffs state that the suit against Defendant seeks review of the October 18, 2005 administrative decision and that Congress has waived sovereign immunity for such actions in the Administrative Procedures Act, 5 U.S.C. §§ 500-706 ("APA").

Agency actions may be reviewed by federal courts if the courts have jurisdiction over them under the right to review created by Section 10 of the APA. *Air Brake Systems, Inc. v. Mineta*, 357 F.3d 632, 638 (6th Cir. 2004). The APA is a limited waiver of sovereign immunity for certain claims seeking non-monetary relief. See 5 U.S.C. § 702. The APA's waiver of sovereign immunity permits suit against the officer in his official capacity for acting "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" or otherwise "unlawfully." See 5 U.S.C. § 706. Additionally, under the APA, federal courts may review two types of agency actions: (1) agency action made reviewable by statute and (2) final agency actions for which there is no other adequate remedy in a court. 5 U.S.C. § 704. To constitute "final

agency action," the action must "mark the consummation of the agency's decision-making process...[and] must not be of a tentative or interlocutory nature;" in addition, "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Air Brake Systems, Inc.*, 375 F.3d at 638 (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

In this case, there is no specific statute creating the right to review the Coast Guard's actions. This Court can only have jurisdiction with respect to a "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The only "final agency action" in this case is the Commandant's October 18, 2005 decision to impose civil penalties based upon Plaintiffs' failure to remove the Bridge. This decision is the only consummation of the agency's decision-making process that determined rights or obligations from which legal consequences flowed.

Plaintiffs specifically request this Court to review the October 18, 2005 decision of the Commandant. Plaintiffs request review of a final agency decision and assert claims seeking non-monetary relief. This Court has jurisdiction, therefore, pursuant to the APA, to review the Commandant's October 18, 2005 decision as a final agency action.

B. Failure to State a Claim

Defendant also argues that Plaintiffs' Complaint should be dismissed for failure to state a claim because Plaintiffs bring duplicate claims, which have already been alleged in *Barack v. Guard*. Although no precise

rule has evolved, as a general rule, duplicative litigation in federal courts should be avoided. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Inherent in every court is the power to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). How this can best be done calls for the exercise of judgment, which must weigh competing interest and maintain an even balance. *Landis*, 299 U.S. 254-55; *Kansas City Southern Railway v. United States*, 282 U.S. 760, 763 (1931).

Faced with a duplicative suit, the federal court may exercise its discretion to stay or dismiss the suit before it, allow both federal cases to proceed, or enjoin the parties from proceeding in the other suit. *Twaddle v. Diem*, 2006 U.S. App. LEXIS 2430, *9 (6th Cir. 2006); *Smith v. SEC*, 129 F.3d 356, 361 (1997). “[S]imple dismissal of the second suit is [a] common disposition because plaintiffs have no right to maintain two actions on the same subject in the same court, against the same defendant at the same time.” *Twaddle*, 2006 U.S. App. LEXIS at *9 (citing *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138-39 (2d Cir. 2000)); see also *Missouri v. Prudential Health Care Plan, Inc.*, 259 F.3d 949, 953-54 (8th Cir. 2001) (joining other courts that have held a district court may dismiss one of two identical pending actions). It is an abuse of discretion, however, to prevent a party from proceeding in a suit that is not truly duplicative. *Smith*, 129 F.3d at 361.

In *Twaddle*, the Court held that although the two complaints were filed in the same court, arose out of the same facts, employed the same legal theories, and

sought to recover for the same lost wages, the claims were not identical because the two complaints were brought against different defendants. *Twaddle*, 2006 U.S. App. LEXIS at *10. In this case, by contrast, Plaintiffs concede that they filed two complaints in the same court, the complaints arise out of the same facts, employ the same legal theories, and seek to recover the same remedy against the same defendant, Admiral Collins.

Here, in both cases, Plaintiffs make the identical argument that the Coast Guard does not have jurisdiction to order removal of the Bridge. In both cases, Plaintiffs make the identical argument that the Coast Guard erred in determining legal ownership or operation responsibilities of the Bridge. In both cases, Plaintiffs seek to enjoin the Coast Guard and seeks review of the Coast Guard's decision determining legal ownership of the Bridge. The claims in both of these cases are identical and therefore duplicative.

It is within this Court's discretion and in the interest of judicial economy to dismiss the claims against Defendant as duplicative. Claims 6 and 8 against the Defendant are hereby dismissed.

V. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is **GRANTED**. Plaintiffs' claims against Admiral Collins (Claims 6 and 8) are dismissed, and Admiral Collins is dismissed as a Defendant in this matter.

IT IS SO ORDERED.

57a

s/Algenon L. Marbley
ALGENON L. MARBLEY
United States District Court Judge

DATED: March 30, 2007

APPENDIX D

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

No. C2-05-01097

[Filed March 30, 2007]

OHIO MIDLAND, INC., <i>et al.</i>)
)
Plaintiffs,)
)
v.)
)
GORDON PROCTOR, Director,)
Ohio Department of)
Transportation, <i>et al.</i>)
)
Defendants.)

JUDGE ALGENON L. MARBLEY
Magistrate Judge Abel

ORDER

This matter comes before the Court on Plaintiffs' Motion for Clarification of the Opinion and Order Denying Plaintiffs' Motion for Leave to File First Amended Complaint, issued by this Court on November 28, 2006 (Doc. No. 125). Plaintiffs now seek

clarification as to the extent of that Order, and suggest that the Court's intent in denying Plaintiffs' Motion for Leave was limited to denying leave as to amended Claim 5 only, as Claim 5 was previously dismissed as not ripe, and the proposed amended complaint failed to cure such deficiency. The Court's Order states that:

[b]ecause Plaintiffs' Proposed Amended Complaint does not cure the ripeness problem addressed by the Court in dismissing Claim 5 of the Original Complaint, leave to amend would be futile, and therefore must be denied. . . . Plaintiffs' Motion for Leave to File Instant First Amended Complaint is **DENIED**.

Plaintiffs now ask the Court to clarify that its denial of leave to amend is limited to Claim 5 and does not apply to amended Claims 1-4 and 6-8. The Court's hereby clarifies that its November 28, 2006 Order denying leave applied to Plaintiffs' *entire* proposed amended complaint, not only to Claim 5. The proposed amended complaint was not considered by the Court in later filings, as leave to file had been denied, and Plaintiffs have not thus far submitted a proposed amended complaint that satisfies Rule 15(a) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

s/Algenon L. Marbley
ALGENON L. MARBLEY
United States District Court Judge

DATED: March 30, 2007

APPENDIX E

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

No. C2-05-1097

[Filed December 28, 2006]

OHIO MIDLAND, INC., <i>et al.</i>)
)
Plaintiffs,)
)
v.)
)
GORDON PROCTOR, Director,)
Ohio Department of)
Transportation, <i>et al.</i>)
)
Defendants.)
)

JUDGE ALGENON L. MARBLEY
Magistrate Judge Abel

OPINION AND ORDER

I. INTRODUCTION

This matter comes before the Court on a combined motion to dismiss filed by Defendants Ohio Department of Transportation ("ODOT"), Gordon

Proctor, Director of ODOT ("Proctor"), and Jim Spain, District Deputy Director of ODOT, District 11 ("Spain"), (collectively, "ODOT Defendants"). For the reasons set forth herein, the Court **GRANTS** Defendants' Combined Motion to Dismiss.

II. BACKGROUND

A. Facts

Because the matter before the Court is Defendants' Motion to Dismiss, the Court will consider the facts in the light most favorable to Plaintiffs. *McGee v. Simon & Schuster, Inc.*, 154 F. Supp. 2d 1308, 1310 (S.D. Ohio 2001).

On September 12, 1922, the United States Congress enacted House Bill 11901, which authorized the construction, operation, and maintenance of a bridge across the Ohio River in order to connect the City of Benwood, West Virginia and the City of Bellaire, Ohio. The Bill incorporated by reference 33 U.S.C. § 491 in which Congress expressly reserved to itself the right to alter, amend, or repeal its authorization:

When, after March 23, 1906, authority is granted by Congress to any persons to construct and maintain a bridge across or over any of the navigable waters of the United States, . . . and when the plans for any bridge to be constructed under [this] title, have been approved by the Secretary it shall not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such

plans has previously been submitted to and received the approval of the Secretary.

33 U.S.C. § 491.

The bridge was opened to traffic in 1926 and is commonly referred to as the "Bellaire Bridge" (hereinafter, the "Bridge").

The Interstate Bridge Company ("IBC") constructed, operated, and maintained the Bridge as a toll bridge until 1991 when ODOT, having the right of appropriation, purchased the existing bridge ramp on the Ohio side of the river from IBC and demolished the ramp for the construction of Ohio Route 7.

IBC and ODOT Defendants allegedly entered into two agreements regarding the Bridge. First, on December 5, 1990, ODOT and IBC entered the first agreement (hereinafter, "Agreement #1"), a contract for the sale of the real property constituting the area of the existing ramp on the Ohio side of the river. Agreement #1 made no provision for any damages caused to the remainder of the Bridge owned by IBC. Second, on January 7, 1991, ODOT and IBC executed the second agreement (hereinafter, "Agreement #2"), in which both parties agreed that the payment was for the real estate as well as damages to the remainder of the Bridge. Agreement #2 provided for the exact same amount of compensation as Agreement #1, which had included compensation for the real estate only.

On March 22, 1991, Plaintiff Roger Barack ("Barack") purchased the remaining portion of the Bridge from IBC intending to operate the Bridge as a toll bridge. Subsequent to this sale, IBC became

defunct. When Barack purchased the Bridge, he purportedly believed that ODOT planned to reconnect the Ohio side of the Bridge to the main part of the Bridge so that the Bridge could reopen to traffic. ODOT later decided, however, that it would neither reconnect the Bridge in Ohio, nor allow Barack to build a ramp to the Bridge. Thereafter, Barack assigned any and all interest he had in the remaining Bridge assets to co-plaintiff, Ohio Midland, Inc. ("Ohio Midland").

The U.S. Coast Guard (the "Coast Guard") adjudged the Bridge to be an "unreasonable obstruction to navigation," and, accordingly, it issued orders for Plaintiff Barack to remove the Bridge. Further, on October 18, 2005 the Coast Guard issued orders for the payment of \$300,000, plus interest and administrative costs, as civil penalties for Barack's alleged failure to comply with its order of removal.^{1 2}

B. Procedural History

On December 5, 2006, Barack and Ohio Midland (collectively, "Plaintiffs") filed their initial complaint (the "Complaint"), consisting of eight claims, against the following defendants: (1) ODOT Defendants; (2) Admiral Thomas H. Collins, Commandant of the Coast

¹ Barack appealed the Coast Guard's administrative order, and that case, which is currently pending in Federal Court, has been consolidated with the instant case. *See Roger Barack v. U.S. Coast Guard Commandant*, Case No. C2-05-1044.

² Notably, in the October 18, 2005 administrative order, the Deputy Chief affirmed the Hearing Officer's civil penalty decision regarding Barack's noncompliance with the Coast Guard's November 14, 2001 order to demolish the Bridge.

Guard; (3) Joe Manchin III, Governor of West Virginia; (4) Norfolk Southern Railway Co., care of CT Corp. System, its statutory agent; and (5) the City of Benwood Mayor's Office, care of Mayor Edward M. Kuca, Jr.

Plaintiffs assert Claims 1, 2, 3, 4, and 7 of the Complaint against ODOT Defendants. Plaintiffs claim that ODOT Defendants: (1) prevented Plaintiffs from using the Bridge by not replacing the Ohio-side ramp, thereby constituting a taking of property without compensation (Claim 1); (2) failed to account to Plaintiffs for the fair market value of salvage materials from the area of the ramp acquired by ODOT (Claim 2); (3) violated the Congressional Act of House Bill 11901 and 33 U.S.C. § 491 by impeding travel over the Bridge without federal permission (Claim 3); and (4) violated the Congressional Act of House Bill 11901 and 33 U.S.C. § 491 by effectively closing the Bridge without federal permission (Claim 4). In addition, Plaintiffs assert that, because ODOT Defendants violated the Congressional Act of House Bill 11901, they should be ordered to pay the removal costs and penalties levied on Plaintiffs by the Coast Guard (Claim 7).

Plaintiffs request various forms of relief in their Complaint with respect to these claims. First, Plaintiffs ask the Court to: (a) order ODOT Defendants to construct a ramp over Ohio State Route 7 to permit the use of the Bridge for vehicular traffic and (b) enjoin ODOT Defendants from impeding Plaintiffs' use of the Bridge as a toll bridge. Second, Plaintiffs request that should the Court order ODOT Defendants to construct a ramp, it should also awarded Plaintiffs damages for loss of toll profits from the date the ramp was removed

by ODOT to the date ODOT completes the new ramp and reopens the Bridge to vehicular traffic. Third, Plaintiffs contend that should the Court choose *not* to order ODOT Defendants to construct a new ramp, the Court should alternatively order ODOT Defendants to file appropriation proceedings to determine the amount of damages due to Plaintiffs for the remainder of the Bridge in Plaintiffs' possession at the time ODOT Defendants allegedly "took" the economic use of the remainder of the Bridge when it acquired the Ohio-side ramp. Fourth, Plaintiffs request money damages for the salvage materials of the ramp and for their claim that ODOT Defendants violated their civil rights by impeding traffic over the Bridge without federal approval.

ODOT Defendants collectively filed this Motion to Dismiss pursuant to 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure on April 6, 2006. On June 29, 2006 Plaintiffs filed a Response to Defendants' Motion to Dismiss in which Plaintiffs voluntarily dismissed ODOT as a defendant and clarified Plaintiffs' ambiguous Complaint by confirming that Plaintiffs bring all claims under § 1983.^{3 4} Defendants replied on August 11, 2006.

³ On that same day, Plaintiffs also filed a Motion for Leave to Amend their Complaint and referred to their Proposed Complaint throughout their Response to Defendants' Motion to Dismiss. This Court, however, denied Plaintiffs' Motion for Leave to Amend on November 28, 2006, thereby rejecting the Proposed Complaint. Therefore, the Court will refer to Plaintiffs' original complaint in its analysis of Defendants' Motion to Dismiss.

⁴ Section 1983 encompasses the "deprivation of any rights, privilege, or immunities secured by the Constitution." *Thomas v.*

Accordingly, Defendants' Motion is now ripe for this Court's review.

III. STANDARD OF REVIEW

When a defendant seeks dismissal under both Rule 12(b)(1) and 12(b)(6), the Court must consider the Rule 12(b)(1) motion first, because the Rule 12(b)(6) motion will become moot if the Court lacks subject matter jurisdiction. *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990).

A. Subject Matter Jurisdiction

Defendants contend that dismissal is warranted under FED. R. CIV. P. 12(b)(1), which enables a defendant to raise by motion the defense of "lack of jurisdiction over the subject matter." When a defendant argues that the plaintiff has not alleged sufficient facts in the complaint to establish subject matter jurisdiction, the court takes the allegations in the complaint as true. *Nichols v. Muskingum College*, 318 F.3d 674, 677 (6th Cir. 2003). The plaintiff bears the burden of proving jurisdiction. *Rogers v. Stratton Indus.*, 798 F.2d 913, 915 (6th Cir. 1986). In considering such a motion, however, the court has wide discretion to consider evidence outside the pleadings to resolve disputed jurisdictional facts. *Nichols*, 318 F.3d at 677.

Shipka, 818 F.2d 496, 499 (6th Cir. 1987), superseded on other grounds, 872 F.2d 772 (6th Cir. 1989) (citing *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978)).

B. Failure to State a Claim

The purpose of a Rule 12(b)(6) Motion to Dismiss is to test the sufficiency of the complaint. *Davis H. Elliot Co., Inc. v. Caribbean Utils. Co.*, 513 F.2d 1176, 1182 (6th Cir. 1975). When considering such motion, a court must construe the complaint in the light most favorable to the plaintiff and accept as true all "factual allegations and permissible inferences therein." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Legal conclusions framed as factual allegations, however, are accorded no such presumption. *Lewis v. ACB Bus. Serv., Inc.* 135 F.3d 389, 405 (6th Cir. 1998). A complaint should not be dismissed under Rule 12(b)(6) "unless it appears beyond doubt that the [p]laintiff can prove no set of facts in support of his claim which would entitle him to relief." *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 724 (6th Cir. 1996) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). The court's focus is on whether the plaintiff is entitled to offer evidence to support the claims, and not on whether the plaintiff will ultimately prevail. *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995). "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Id.*

A plaintiff need not include all of the particularities of the claims against the defendant in order to survive a 12(b)(6) motion. *Brooks v. Am. Broad. Co., Inc.*, 932 F.2d 495, 497 (6th Cir. 1991). Pursuant to the Federal Rules of Civil Procedure, the complaint need only set forth the basis of the court's jurisdiction, a short and plain statement of the claim entitling the plaintiff to relief, and a demand for judgment. See FED. RULE CIV. PRO. 8(a). A court will grant a motion for dismissal under 12(b)(6) only if there is an absence of law to

support a claim of the type made or of facts sufficient to make a valid claim, or if on the face of the complaint there is an insurmountable bar to relief indicating that the plaintiff does not have a claim. *Cnty. Mental Health Serv. v. Mental Health and Recovery Bd.*, 395 F. Supp. 2d 644, 649 (S.D. Ohio 2004).

IV. ANALYSIS

Defendants urge this Court to dismiss Plaintiffs' complaint for lack of subject matter jurisdiction and for failure to state a claim. Defendants claim this Court lacks subject matter jurisdiction over Proctor and Spain because they are protected by Eleventh Amendment immunity, and are, therefore, not liable under § 1983. Additionally, Defendants maintain that Plaintiffs have failed to state a claim against Proctor and Spain because: (1) Plaintiffs' claims are barred by the statute of limitations; (2) Plaintiffs do not allege any personal involvement of Proctor or Spain; and (3) Plaintiffs have an adequate remedy under state law thus barring their suit in federal court.

Because Defendants are shielded from monetary liability by the Eleventh Amendment, and all of Plaintiffs' claims are barred by the statute of limitations, Plaintiffs' claims are hereby dismissed.

A. Subject Matter Jurisdiction

Defendants argue they are immune from suit in this Court under the Eleventh Amendment to the United States Constitution which provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or

equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

The Eleventh Amendment has been extended judicially to prevent a federal court from hearing a suit brought by a citizen against his own state, or agencies of the state, unless the state has waived its sovereign immunity. *Hans v. Louisiana*, 134 U.S. 1 (1890). In this case, Plaintiffs concede that ODOT, an entity and agent of the State of Ohio, is protected by Eleventh Amendment sovereign immunity and, therefore, have voluntarily dismissed ODOT as a Defendant. See Pls.' Response in Opposition.

The Eleventh Amendment also shields state officials who are sued in their official capacities for monetary damages. *Kentucky v. Graham*, 473 U.S. 159 (1985). Sovereign immunity does not, however, preclude suits against state officers for: (1) prospective injunctive relief, or (2) monetary damages to be paid out of the state officers' own pockets (*i.e.*, suing officers in their "individual capacities"). See *Ex Parte Young*, 209 U.S. 123 (1908); *Kentucky v. Graham*, 473 U.S. 159 (1985); *Foulks v. Ohio Dept. of Rehab. and Corr.*, 713 F.2d 1229 (6th Cir. 1983). In other words, if a state agency is acting in violation of federal law, suit to enjoin prospectively the impermissible behavior may be brought in federal court by naming the state officer as the defendant and seeking prospective injunctive relief. Federal courts may not, however, award retrospective relief, such as money damages or its equivalent, if the State invokes its immunity. *Edelman v. Jordan*, 415 U.S. 651 (1974). Yet state officers can

be sued in their *individual* capacities for monetary damages paid from the officers' own funds.⁵ *Kentucky v. Graham*, 473 U.S. 159 (1985).

In this case, Plaintiffs seek both injunctive and monetary relief from Proctor and Spain. To overcome sovereign immunity claims, therefore, Plaintiffs must show that the relief sought is: (1) prospective injunctive relief and (2) monetary funds to be paid by Proctor and Spain in their individual capacities.

Injunctive Relief

There is no Eleventh Amendment bar to federal court jurisdiction where the suit against state officers is for prospective injunctive relief. *Ex parte Young*, 209 U.S. 123 (1908). State officers have no authority to violate the constitution and therefore, any illegal act—such as taking without just compensation—is deprived of state authority and the state has no power to bestow any immunity from responsibly to the Constitution, the supreme law of the United States. *Ex parte Young*, 209 U.S. at 160. As such, a plaintiff may enforce a claim of federal right by obtaining injunctive relief against a state officer, even in the officer's official capacity. In *Edelman v. Jordan*, 415 U.S. 651 (1974), the Supreme Court explained that the purpose of this exception to the Eleventh Amendment shield is to prevent continuing violations of federal law, but not

⁵ Of course state agents may still rely on personal defenses such as qualified immunity, which shields public officials performing discretionary functions from civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

to remedy past violations. Therefore, an *Ex parte Young* plaintiff may obtain prospective injunctive relief—that is, an order compelling state compliance in the future—but not retrospective relief. See *Edelman*, 415 U.S. at 664-65. In addition, the Eleventh Amendment does not prohibit a federal court from granting injunctive relief against a state officer even though compliance with the injunction will, in effect, cost the state a sizeable amount of money in the future. See, e.g., *Quern v. Jordan*, 440 U.S. 332 (1979); *Milliken v. Bradley*, 433 U.S. 267 (1977); *Edelman v. Jordan*, 415 U.S. 651 (1974).

In this case, Plaintiffs claim that they seek prospective injunctive relief by requesting this Court to order Proctor and Spain to: (1) construct a ramp to permit use of the Bridge for vehicular traffic; (2) refrain from impeding Plaintiffs' use of the Bridge as a toll bridge; and (3) retrieve the salvage materials ODOT disposed of and transfer them to Plaintiffs. Through this prospective injunctive relief, Plaintiffs seek to remedy the alleged unconstitutional taking of their property interest in the residue of the Bridge and the salvage materials.

At first glance, the injunctive relief sought by Plaintiffs appears to be, in reality, monetary damages to be paid from the state treasury, which is barred by the Eleventh Amendment, since an injunction requiring Proctor and Spain to retrieve salvage materials and rebuild the ramp would require substantial expenditures from the state. Because the law is clear that courts can order state agents to provide injunctive relief regardless of the cost to the state, the fact that ODOT would have to spend state funds in building a ramp to the Bridge does not

prevent this Court from ordering that specific relief. *Quern v. Jordan*, 440 U.S. 332 (1979). Therefore, Plaintiffs' claims regarding Defendants' alleged taking of the Bridge and violation of federal law by impeding traffic and effectively closing the Bridge (Claim 1, 3, 4, 7) will not be dismissed for lack of subject matter jurisdiction, because the related relief requested is prospective injunctive relief.

Plaintiffs' request that the Court order Proctor and Spain to retrieve salvage materials or account to Plaintiffs for the damages, however, is in a different category. ODOT sold the salvage materials as early as 1991, so it is nearly impossible for Defendants to recover the materials, as they may have been resold or incorporated in another bridge structure. In the alternative, Plaintiffs ask that the Court order Defendants to file appropriation proceedings to determine the amount of damages due to Plaintiffs for their interest in the salvage materials. In effect, Plaintiffs are asking the Court either to order Defendants to do the impossible, or pay for it. This is not prospective injunctive relief, and the relief requested in Claim 2 will, therefore, be considered monetary damages and analyzed below.

Monetary Relief

In the alternative to the injunctive relief requested, Plaintiffs seek an award of compensatory and punitive damages against Proctor and Spain for: (1) taking the Bridge and salvage materials without compensation; (2) effectively impeding travel and closing the Bridge in violation of federal law; and (3) the costs of removing the residue of the Bridge and paying civil

penalties as ordered by the Coast Guard.⁶ Plaintiffs contend that they seek this relief from Proctor and Spain in their personal capacities.⁷ Because the Eleventh Amendment bars monetary damage suits against state officers sued in their official capacities, whether Plaintiffs' claims can withstand dismissal depends on whether they are suing Proctor and Spain in their individual or official capacities.

The Supreme Court, noting that the distinction between individual and official capacity suits "apparently continues to confuse lawyers and confound lower courts," has attempted to articulate the doctrinal differences between the actions:

Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, generally represent only another way of pleading an action against an entity of which an officer is an agent. As long

⁶ In their complaint, Plaintiffs ask for monetary relief *in addition* to injunctive relief, such that even if Defendants are ordered to build a ramp, Plaintiffs should be awarded damages for lost toll profits from the time of the ramp destruction to the time the Bridge reopens to traffic. In their Response, however Plaintiffs assert that damages are requested *in the alternative* to injunctive relief.

⁷ Plaintiffs admit that their original Complaint did not make explicit allegations of personal liability, so that one might reasonably interpret the Complaint as seeking to impose official liability enforceable against State funds. They seek to clarify their intent in the Proposed Amended Complaint, which has been denied. This Court will, however, consider Plaintiffs' claims in light of their intent set forth in their Response in Opposition.

as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is not a suit against the official personally, for the real party in interest is the entity. Thus, while an award of damages against an official in his personal capacity can be executed only against the official's personal assets, a plaintiff seeking to recover on a damages judgment in an official-capacity suit must look to the government entity itself.

Kentucky v. Graham, 473 U.S. at 165 (internal quotes and citations removed).

Because the pleadings in this case are ambiguous, this Court must look to the manner in which the parties have treated the suit to determine whether Plaintiffs are suing Defendants in their official or individual capacities. *See, e.g., Shockley v. James*, 823 F.2d 1068 (7th Cir. 1987) (noting the ambiguous nature of plaintiff's pleadings and finding that because plaintiffs sought personal liability, and defendants invoked defenses only available to individuals, the court would treat the action as one against defendants in their individual capacities); *Pinaud v. County of Suffolk*, 52 F.3d 1139 (2d Cir. 1995) (holding that, where the complaint was unclear, plaintiff's request for punitive damages, along with defendants' summary judgment motion on absolute immunity grounds suggested that the parties believed that the action was a personal capacity suit); *Shabazz v. Coughlin*, 852 F.2d 697 (7th Cir. 1988) ("[Plaintiffs] request for punitive and compensatory damages, coupled with the defendants' summary judgement motion on qualified

immunity but not Eleventh Amendment grounds, suggests that the parties believed that this action is a personal capacity suit.”).

The Court observes that while Plaintiffs state their intention to sue Defendants in their personal capacities in their Response to Defendants’ Motion, upon careful review of the pleadings, it is clear, as a matter of law, that Proctor and Spain were not acting in their personal capacities and that, therefore, any funds to be paid would come from the state treasury. It appears that the parties themselves treated this case as an official capacity suit, despite Plaintiffs’ characterization, and in the interests of justice, substance regularly trumps form.

First, Plaintiffs named Proctor and Spain in their Complaint only by way of Proctor’s and Spain’s positions at ODOT: “Defendant Ohio Department of Transportation has as its Director Gordon Proctor with offices in Columbus, Ohio. Defendant Ohio Department of Transportation-District 11 has as its Deputy Director Jim Spain with principal offices in New Philadelphia, Ohio.” The Complaint proceeds with references to ODOT or “Defendants ODOT” throughout the allegations, but there are absolutely no allegations of any conduct by either Proctor or Spain. Second, neither Defendants’ Motion nor their Reply raise any personal capacity defense (such as qualified immunity), but only official capacity defenses (such as sovereign immunity). Third, Defendants maintain that Proctor and Spain were not even in their current positions with ODOT at the time of the actions giving

rise to Plaintiffs' compliant.⁸ Plaintiffs assert that even if Defendants were not the initial decision-makers with respect to the Bridge, once they became directors, they "continued the decision" not to rebuild the ramp or pay Plaintiffs and should, therefore, be subject to a personal capacity suit. This Court disagrees.

And individual defendant in a § 1983 action can be held liable only upon a showing that he was personally responsible for, or personally involved in, the deprivation of rights which form the basis of the suit. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). In other words, respondeat superior cannot form the basis for liability under 42 U.S.C. § 1983. *Bellamy v. Bradley*, 729 F.2d 416, 421 (6th Cir.1984).

In this case, Proctor and Spain were not in their respective positions at the time of the alleged taking. Plaintiffs do not allege any personal participation on the part of Defendants other than their "continued decision" to not rebuild the ramp. Such "action" does not rise to the level of personal involvement necessary to demonstrate, as a matter of law, that Plaintiffs intended to sue Proctor and Spain in their individual capacities.

⁸ Plaintiffs assert that the Court should not consider this information brought forth by Defendants in its analysis of Defendants' Motion to Dismiss because the information is not within the pleadings themselves. In deciding whether or not this Court has subject matter jurisdiction, however, the Court has wide discretion to consider affidavits and documents outside the pleadings. *Absolute Mach. Tools, Inc. V. Clancy Mach. Tools, Inc.*, 410 F. Supp. 2d 665, 668 (N.D. Ohio 2005).

Because Plaintiffs do not allege personal involvement of Proctor and Spain, and the parties themselves treated Plaintiffs' complaint as an individual capacity suit, notwithstanding Plaintiffs' characterization, this Court concludes that this action is not one against Proctor and Spain in their individual capacities, but against Defendants in their official capacities as directors of ODOT. As discussed above, official capacity suits are barred by the Eleventh Amendment unless Plaintiffs seek prospective relief. Therefore, Claims 2, 3, 4, and 7 are hereby dismissed to the extent they seek monetary relief. The Eleventh Amendment is not an obstacle to relief for Claims 1, 3, 4, and 7, to the extent they seek prospective injunctive relief.

B. Failure to State a Claim

Defendants also argue that Plaintiffs' Complaint should be dismissed for failure to state a claim because, among other things, Plaintiffs' claims are time-barred by the applicable statute of limitations.

Actions brought pursuant to § 1983 incorporate the statute of limitations from a state's general personal injury statute. *Trzebuckowski v. City of Cleveland*, 319 F.3d 853, 855 (6th Cir. 2003) (citing *Owens v. Okure*, 488 U.S. 235, 249-50 (1998)). In Ohio, the applicable statute of limitations is set forth in Ohio Rev. Code 2305.10, which provides that the plaintiff must bring an action within two years after the cause of action accrues. *Browning v. Pendleton*, 869 F.2d 989, 992 (6th Cir. 1998) (en banc). The two-year statute of limitations applies to all § 1983 actions, including those involving taking without just compensation

under the Fifth Amendment. *Banks v. City of Whitehall*, 344 F.3d 550, 553 (6th Cir. 2003).

Plaintiffs concede that their claims, all of which arise under § 1983, are governed by Ohio's two-year statute of limitations. The issue before the Court is, rather, when the statute of limitations began to accrue. While the applicable statute of limitations is dictated by state law, the question of when the statute begins to run is governed by federal law. *Ruff v. Runyon*, 258 F.3d 498, 500 (6th Cir. 2001) (citing *Wilson v. Garcia*, 471 U.S. 261, 268-71 (1985)). Under federal law, "the statute begins to run when plaintiffs knew or should have known of the injury which forms the basis of their claims." *Id.* (Citations omitted). "In determining when the cause of action accrues in section 1983 actions, [courts] have looked to what event should have alerted the typical lay persons to protect his or her rights." *Kuhnle Brothers, Inc. v. County of Geauga*, 103 F.3d 516, 520 (6th Cir. 1997) (citing *Dixon v. Anderson*, 928 F.2d 212, 215 (6th Cir. 1991)).

In this case, the events leading to the alleged taking of the Bridge and violation of House Bill 11901 occurred in 1990 and 1991. Plaintiffs contend that the "injury or loss" effectively occurred on October 18, 2005 when the Coast Guard ordered Plaintiff Barack to demolish the Bridge.⁹ Plaintiffs assert that the taking of the residue of the Bridge was not "consummated" until it was ordered removed on October 18, 2005,

⁹ As noted earlier, the October 18, 2005 order actually affirmed the Hearing Officer's decision to fine Barack for not complying with the Coast Guard's November 14, 2001 order to demolish the Bridge.

because at any time until that date, Proctor and Spain could have constructed a new ramp to permit continued use of the Bridge. Plaintiffs rely on *United States v. Dickinson*, 331 U.S. 745 (1947), where the court held that the plaintiff, the owner of land that had been flooded by the government, did not realize the extent of the flooding damage until the government's actions had "so manifested themselves that a final account [could] be struck." The court held that the governmental taking in that case was not a single event, but a continuing process of events, and the plaintiff's taking claim did not accrue until the flooding had become stabilized.

Plaintiffs' situation does not align with *Dickerson*. Plaintiff Barack purchased the remaining portion of the Bridge *after* ODOT acquired the Ohio-side ramp.¹⁰ While Barack intended to continue operation of the Bridge as a toll Bridge, ODOT abandoned its alleged plans to rebuild the Ohio-side ramp over the newly constructed highway and refused to allow Barack to build the ramp himself. Therefore, Plaintiffs knew of the possible non-use of the Bridge as early as the time Barack purchased it, or shortly thereafter when ODOT abandoned its alleged rebuilding plan. Plaintiffs argue that their claims are within the applicable statute of limitations because the alleged violations were not complete until October 18, 2005 when the Coast Guard ordered the Bridge to be removed. The Coast Guard,

¹⁰ The Court notes that Plaintiffs may not even have a takings claim, because when they purchased the Bridge, the ramp was not part of the sale; Plaintiffs merely had the mistaken belief that ODOT planned to rebuild the passage way. Because this argument was not raised by Defendants, however, the Court will continue to analyze the takings claim as asserted by Plaintiffs.

however, having determined that the Bridge represented an unreasonable obstruction to navigation, issued a notice to Plaintiff Barack in November of 1998 affording him 60 days to provide the Coast Guard with his plans to demolish the Bridge.¹¹ Additionally, the October 18, 2005 order affirmed findings made by the Coast Guard Hearing Officer on November 14, 2001 that Barack failed to comply with the Coast Guard's demolition orders. Even if Plaintiffs were hopeful that Defendants would alter their plans and decide to rebuild the ramp when Plaintiff first bought the Bridge, Plaintiffs had reason to know of their injury in 1998, and no later than 2001, which is well over two years before they filed their complaint in 2005.

Nevertheless, Plaintiffs argue that even if their claims arose more than two years prior to the filing of this action, the statute of limitations was tolled until October 18, 2005 because Defendants "continued decision" to not rebuild the Bridge was a "continuing violation" of federal law and Plaintiffs' rights. Plaintiffs claim that the statute of limitations period was tolled until Defendants either decided to rebuild the Bridge in accordance with Plaintiffs' rights, or no longer had the ability to do so, which Plaintiffs assert happened on October 18, 2005 instead of any of the early dates on which Plaintiffs received demolition orders from the Coast Guard.

¹¹ See Pls' Complaint, Exhibit A, in *Roger Barack v. U.S. Coast Guard Commandant*, Case No. C2-05-1044, which has been consolidated with the present action; Pls' Motion for Leave to Amend and Proposed Amended Complaint P. 16;

As threshold matter, the Court notes that “[c]ourts have been extremely reluctant to apply [the “continuing violation”] doctrine outside of the context of Title VII.” *Bygrave v. Van Reken*, 238 F.3d 419, 2000 WL 1769587 *2 n.2 (6th Cir. 2000) (quoting *LRL Properties v. Portage Metro Housing Authority*, 55 F.3d 1097, 1105 n.3 (6th Cir. 1995)). The doctrine has been applied to two limited circumstances within Title VII. The first “arises when there is some evidence of present discriminatory activity giving rise to a claim of a continuing violation.” *LRL Properties*, 55 F.3d at 1105 (quoting *Dixon v. Anderson*, 928 F.2d 212, 216 (6th Cir. 1991)). For example, each time an employer discriminates among employees by underpaying certain workers, the statute of limitations begins again, as every act is an illegal one. The second arises where there has been “a longstanding and demonstrable policy of discrimination.” *Id.* at 1106.

No matter how favorably construed, the facts pled by Plaintiffs cannot establish a continuing violation. Defendants’ alleged “continued decision” not to rebuild the ramp does not fall within either of the forgoing categories, as it was merely a manifestation of the alleged prior taking. There were no new and independent acts committed by Proctor or Spain. The Plaintiffs complain of a discrete act that occurred at a discoverable and discernable time.

Plaintiffs simply cannot pick one date from several on which they claim was the “consummation” of the Defendants’ alleged taking. In reality, the supposed taking could have occurred as early as 1998 when the Coast Guard notified Barack that it determined the Bridge to be an unreasonable obstruction to navigation. Surely Defendants would not have then

"changed their minds" and decided to rebuild the ramp, when they knew the Coast Guard was ordering it to be demolished. If there was a taking of property interests belonging to Plaintiffs, they had reason to know of such injury as early as 1998, and certainly no later than 2001 when the Hearing Officer penalized Barack for not complying with its orders to demolish the structure.

Because more than two years have elapsed between the time Plaintiffs' cause of action accrued and the time Plaintiffs filed this action, Claims 1, 3, 4, and 7 are barred by the statute of limitations, and are hereby dismissed. Analysis of Defendants' remaining arguments as to why Plaintiffs failed to state a claim is, therefore, no longer necessary.

V. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss is **GRANTED**, Plaintiffs claims against Proctor and Spain (Claims 1, 2, 3, 4, and 7) are dismissed, and Proctor and Spain are dismissed as Defendants in this matter.

IT IS SO ORDERED.

s/Algenon L. Marbley
ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

DATED: December 28, 2006

APPENDIX F

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

No. C2-05-1097

[Filed November 28, 2006]

OHIO MIDLAND, INC., <i>et al.</i>)
)
Plaintiffs,)
)
v.)
)
GORDON PROCTOR, Director,)
Ohio Department of)
Transportation, <i>et al.</i>)
)
Defendants.)

JUDGE ALGENON L. MARBLEY
Magistrate Judge Abel

OPINION AND ORDER

I. INTRODUCTION

This matter comes before the Court pursuant to Plaintiffs' Motion for Reconsideration and Plaintiffs' Motion for Leave to File Instanter First Amended

Complaint. For the reasons set forth herein, the Court **DENIES** Plaintiffs' Motion for Reconsideration and **DENIES** Plaintiffs' Motion for Leave to File Instanter First Amended Complaint.

II. BACKGROUND

A. Facts

On September 12, 1922, the United States Congress authorized the construction, operation and maintenance of a bridge across the Ohio River in order to connect the City of Benwood, West Virginia and the City of Bellaire, Ohio. Congress expressly reserved to itself the right to alter, amend or repeal its authorization. The bridge was opened to traffic in 1926 and is commonly referred to as the "Bellaire Bridge" (hereinafter, the "Bridge").

The Interstate Bridge Company ("IBC") constructed, operated and maintained the Bridge as a toll bridge until 1991, at which time the Ohio Department of Transportation ("ODOT") purchased the existing bridge ramp on the Ohio side of the river from IBC and demolished the ramp for the construction of Ohio Route 7.

On March 22, 1991, Plaintiff, Roger Barack ("Barack") purchased the remaining portion of the Bridge from IBC, intending to continue the operation of the Bridge as a toll bridge to serve the Bellaire and Benwood communities. When Barack purchased the Bridge, he purportedly believed that ODOT was working on plans to reconnect the Ohio side of the Bridge to the main part of the Bridge so that the Bridge could reopen to traffic. ODOT later decided,

however, that it would neither reconnect the Bridge in Ohio, nor allow Barack to build a ramp to the Bridge. Barack then assigned any and all interests he had in the remaining Bridge assets to co-plaintiff, Ohio Midland, Inc. ("Ohio Midland").

The U.S. Coast Guard (the "Coast Guard") adjudged the Bridge to be an "unreasonable obstruction to navigation," and, accordingly, it issued orders for Plaintiff Barack to remove the Bridge. Further, the Coast Guard issued orders for the payment of \$300,000 plus interest and administrative costs as civil penalties for Barack's alleged failure to comply with its order of removal.¹

B. Procedural History

On December 5, 2006, Barack and Ohio Midland (collectively, "Plaintiffs") filed their initial complaint (the "Original Complaint"), consisting of eight claims, against the following defendants: (1) ODOT; Gordon Proctor, the Director of ODOT; and Jim Spain, the Deputy Director of ODOT District 11 (collectively, "ODOT Defendants"); (2) Admiral Thomas H. Collins ("Collins"), Commandant of the Coast Guard; (3) Joe Manchin III ("Manchin"), Governor of West Virginia; (4) Norfolk Southern Railway Co. ("NSR"), care of CT Corp. System, its statutory agent; and (5) the City of Benwood Mayor's Office, care of Mayor Edward M. Kuca, Jr. ("Benwood") (collectively, "Defendants").

¹ Barack appealed the Coast Guard's administrative order, and the case, which is currently pending in Federal Court, has been consolidated with the instant case. See *Roger Barack v. U.S. Coast Guard Commandant*, Case No. C2-05-1044.

In general, Plaintiffs assert Claims 1 through 4 of the Original Complaint against ODOT Defendants for (1) damages to the remainder of the Bridge caused by ODOT's destruction of the Ohio-side ramp; (2) the fair market value of salvage materials from the area of the ramp acquired by ODOT; (3) damages caused by ODOT's failure to replace the ramp in order to allow the Bridge to reopen; and (4) damages due to ODOT's impeding travel over the Bridge without authorization expressly reserved by Congress. Plaintiffs assert in Claim 5 that, should the Court choose not to compel ODOT Defendants to replace the ramp, the Court should alternatively find the Bridge "abandoned" by the Plaintiffs, and conclude that, pursuant to Ohio and West Virginia laws, the remainder of the Bridge would revert to the owners of the land. Plaintiffs assert Claim 5 against Defendants Manchin, Benwood, Collins and NSR on the basis that the State of West Virginia, the City of Benwood, the U.S. Coast Guard, and NSR may each have a propriety interest in the land upon which the Bridge is built and may, therefore, be responsible for its removal. In Claims 6 and 7, Plaintiffs maintain that if the Court concludes that the Bridge is "abandoned," Plaintiffs no longer own the Bridge and the Court should enjoin the Coast Guard from ordering Plaintiffs to remove the Bridge or pay the civil penalties, or alternatively, order ODOT Defendants to pay such removal costs and penalties. Finally, in Claim 8, Plaintiffs asserted that because they disagree with the Coast Guard as to whether the Coast Guard has jurisdiction over the Bridge, the Court should make a judicial interpretation of the extent of the Coast Guard's authority.

Plaintiffs request various forms of relief in their Original Complaint. First, Plaintiffs ask the Court to

(a) order ODOT Defendants to construct a vehicular ramp over Ohio State Route 7 to permit the use of the Bridge for vehicular traffic and (b) enjoin ODOT Defendants from impeding Plaintiffs' use of the Bridge as a toll bridge. Second, Plaintiffs request that should the Court order ODOT to construct a ramp, Plaintiffs should also be awarded damages for their loss of toll profits from the date of removal of the ramp to the date of completion of the new ramp and the reopening of the bridge to vehicular traffic. Third, Plaintiffs contend that should the Court choose *not* to order ODOT to construct a new ramp, the Court should alternatively order ODOT to file appropriation proceedings to determine the amount of damages due to Plaintiffs for the remainder of the Bridge in their possession at the time ODOT allegedly "took" the economic use of the remainder of Bridge when it acquired the Ohio-side ramp. Fourth, Plaintiffs request money damages for the salvage materials of the ramp, and for their claim that ODOT violated their civil rights by impeding traffic over the Bridge without federal approval. Fifth, should the Court not order ODOT to construct a new ramp, Plaintiffs request a declaration that the Bridge has been abandoned and is now property of the landowners.

Claim 5, which asks the Court to find that Plaintiffs abandoned the Bridge such that the Bridge now belongs to the landowners, was the only claim that Plaintiffs asserted against Defendants Manchin, Benwood and NRS. On December 23, 2005, Defendant Manchin brought a Motion to Dismiss Claim 5. On June 13, 2006, this Court granted Manchin's Motion to Dismiss, finding Claim 5 to be contingent upon the outcome of Claims 1 through 4, and thus not ripe for review. Because Claim 5 was the only action brought

against Manchin, Benwood and NRS, this Court also dismissed them as defendants in this matter.

On June 29, 2006, Plaintiffs filed a Motion for Reconsideration of this Court's June 13th order. Additionally, Plaintiffs filed a Motion for Leave to File Instant First Amended Complaint, pursuant to Federal Rule of Civil Procedure 15(a), seemingly in an effort to cure the ripeness defect of Claim 5. Defendants Manchin and NSR filed Responses in Opposition to both of Plaintiffs' motions. Defendant Collins and the ODOT Defendants filed Responses in Opposition to Plaintiffs' Motion for Leave to File Amended Complaint. Accordingly, both of Plaintiffs' motions are now ripe for this Court's review.

III. STANDARD OF REVIEW

A. Motion for Reconsideration

As a general principle, motions for reconsideration are looked upon with disfavor unless the moving party demonstrates one of the following: (1) a manifest error of law; (2) newly discoverable evidence which was not previously available to the parties; or (3) intervening change of controlling law. *Meekison v. Ohio Dep't of Reh. & Corr.*, 181 F.R.D. 571, 572 (S.D. Ohio 1998) (citing *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3rd Cir. 1985)). "Neither the passage of time, during which the legal landscape did not change, nor a different spin on the same arguments, is a proper basis for a motion for reconsideration." *Id.* Furthermore, "mere dissatisfaction with a Court's ruling is an inappropriate and insufficient ground to support a motion for reconsideration." *Id.* This doctrine reflects the sound policy that litigation should not be subject to

“instant replays” but rather decided and put to rest. See *Petition of U.S. Steel Corp.*, 479 F.2d 489, 494 (6th Cir. 1973).

B. Motion for Leave to Amend

Federal Rule of Civil Procedure 15(a) provides that “leave shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a); *Forman v. Davis*, 371 U.S. 178, 182 (1962). While the Sixth Circuit is “very liberal” in permitting amendments, certain factors may warrant the denial of a motion to amend: undue delay, bad faith, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance for the amendment, and a futility of the amendment. *United States v. The Limited, Inc.*, 179 F.R.D. 541, 550 (S.D. Ohio 1998).

Because Plaintiffs seek the same remedy through their Motion for Reconsideration and Motion for Leave to Amend,² both motions will be considered together in the following discussion.

IV. ANALYSIS

A. Motion for Reconsideration

Plaintiffs ask the Court to reconsider its June 13, 2006 order, in which the Court found that Plaintiffs

² Plaintiffs explained that they filed both motions as a cautionary measure in hopes that Claim 5, and the corresponding defendants, would be reinstated either through the motion for reconsideration or the motion for leave to amend. Pl’s Motion for Reconsideration at 2, n. 1.

lack standing at this time to assert Claim 5 of the Original Complaint, dismissed Claim 5 as not ripe, and dismissed Defendants Manchin, Benwood and NSR. Plaintiffs urge the Court to reconsider its decision in light of Plaintiffs' Proposed Amended Complaint.

Plaintiffs assert that because the Court raised the ripeness issue *sua sponte*, Plaintiffs were not given an opportunity to brief the issues of standing and ripeness. Plaintiffs contend that had they been put on notice that the Court may make such a determination, they could have amended Claim 5 of the Original Complaint to read as it now does in the Proposed Amended Complaint. The Original Claim 5 stated, "[I]f Defendants ODOT are not compelled to construct a ramp to keep the bridge open . . . and the bridge is deemed abandoned then the remainder of the bridge as a structure should be ordered to revert to the owners of said land." The Proposed Amended Complaint seeks to avoid the Court's order by rewording Claim 5, which now reads, "Plaintiffs abandoned the residue of the Bridge, and said residue is a permanent fixture merged with the land upon which it is built, and ownership of the residue reverted to the owners of said land." Proposed Amended Complaint ¶ 43. Plaintiffs assert that Claim 5 should be considered "in the alternative" to the other claims listed by Plaintiffs, which ask the court to order ODOT Defendants to reconstruct the Ohio-side ramp or pay Plaintiffs for "taking" the economic value of the use of the Bridge. Plaintiffs rely on Federal Rule of Civil Procedure 8(c), as authority for filing pleadings in the alternative. Plaintiffs' reliance is misplaced.

Even if the Court considers Plaintiffs' Proposed Amended Complaint to determine whether to

reconsider the Court's order—on the theory that Plaintiffs are asserting “new facts” through the Proposed Amended Complaint that justify reconsideration—the Court finds that the mere rewording of Claim 5 is insufficient to justify reconsideration. Again, “a different spin” on the same arguments is not a proper basis for a motion for reconsideration. *Meekison*, 181 F.R.D. at 572. The facts in the Proposed Amended Complaint are, in reality, no different from the facts in the Original Complaint. In both complaints, Plaintiffs simultaneously (a) maintain ownership over the Bridge by asking the Court to order ODOT Defendants to rebuild the ramp and refrain from impeding further vehicular traffic across the Bridge and (b) ask the Court to declare that Plaintiffs have abandoned the Bridge and that, as a fixture, the Bridge has reverted back to the landowners. The Proposed Amended Complaint merely changes the wording of the facts to imply that Plaintiffs have already abandoned the Bridge. Yet Plaintiffs offer no facts—*particularly facts that were not previously available to the parties*—in support of this legal theory. Plaintiffs simply changed the tense of the verbs so that it appears that Plaintiffs have already abandoned the property. The Court finds this rewording does not add facts, but simply puts a “spin” on the old ones. Because Plaintiffs fail to: (1) offer additional facts which were not previously available to the parties; (2) demonstrate a manifest error of law; or (3) present an intervening change of controlling law, reconsideration is improper.

B. Motion for Leave to Amend

Having decided the Motion for Reconsideration is not proper, the Court must now consider whether

Plaintiffs should be granted leave to file the Proposed Amended Complaint. Plaintiffs argue that leave is freely granted under Rule 15(a) of the Federal Rules of Civil Procedure, and that leave is proper here because the Proposed Amended Complaint cures the ripeness defect of Claim 5 by asserting that Plaintiffs have already abandoned the Bridge. Plaintiffs argue that Claim 5 is not contingent on the other claims and should instead be considered in the alternative.

Under Rule 8(e)(2) of the Federal Rules of Civil Procedure, a party may set forth two or more statements of a claim alternately or hypothetically. Rule 8(e)(2), however, is limited by Rule 11 of the Federal Rules of Civil Procedure, which states that when presenting pleadings to the court, the party is certifying that "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11(b)(3). Plaintiffs may not, under Rule 11 limitations, assert contradictory statements of fact unless Plaintiffs are legitimately in doubt about the facts in question. *American Intern. Adjustment Co. v. Galvin*, 86 F.3d 1455, 1461 (7th Cir. 1996). Therein lies the rub.

In this case, Plaintiffs cannot legitimately be in doubt about the facts relating to ownership or abandonment of the Bridge because abandonment *lies within Plaintiffs' own intentions*. See *Hodges v. Ettinger*, 189 N.E. 113, 114 (Ohio 1934) ("Abandonment is the intentional relinquishment of a known right."); *Hamilton v. Harville*, 577 N.E.2d 1125, 1127 (Ohio Ct. App. 1989) ("In order for an abandonment to exist, affirmative proof of the intent

to abandon coupled with acts or omissions implementing the intent must be shown. Therefore, occasional, infrequent or even complete non-use is not sufficient in itself to establish the existence of an "abandonment," absent other evidence tending to prove the intent to abandon."). On the one hand, Plaintiffs demand that the ramp be rebuilt so they may operate the Bridge, and on the other hand they ask, in the alternative, for the Court to declare that Plaintiffs have abandoned the Bridge. Plaintiffs cannot simultaneously assert ownership over the Bridge and also assert that they have abandoned the Bridge simply by labeling them as alternative theories of recovery.

Plaintiffs' situation is distinguishable from cases in which the facts truly may be in doubt, justifying pleading alternative facts. See *Molsbergen v. United States*, 757 F.2d 1016, 1018-19 (9th Cir. 1985); *Astroworks, Inc. V. Astroexhibit, Inc.*, 257 F.Supp.2d 609 (S.D.N.Y. 2003). For example, in *Molsbergen*, the plaintiff claimed that the defendants exposed her husband to dangerous chemicals, which caused his death. The plaintiff claimed that the defendants were either negligent in the exposure, or did so intentionally. Pleading in the alternative was acceptable in the complaint because the plaintiff needed to continue though discovery in order to determine the actual state of mind of the defendants. Similarly, in *Astroworks*, the plaintiff was permitted to plead both breach of contract and unjust enrichment even though the state law did not allow recovery under both theories. The court explained that while the plaintiff could not allege both that there was an agreement and that there was not an agreement, the plaintiff could allege inconsistent theories of recovery

such that if the agreement amounted to a contract, the remedy would be breach and if the agreement did not rise to the level of a contract, the remedy would be for unjust enrichment. *Astroworks*, 257 F.Supp.2d at 616.

In the present case, discovery will likely not add anything to Plaintiffs' theory of recovery because abandonment rests solely on Plaintiffs' actual intentions with respect to the Bridge. Plaintiffs are permitted to plead inconsistent facts, pursuant to Rule 8(e), but only when facts are in doubt such that discovery will clarify confusion. Because abandonment rests on the intention of Plaintiffs themselves, Plaintiffs must know the underlying facts relatively well: either Plaintiffs intended to abandoned the Bridge or they did not.

There is a difference between a case involving certain facts where alternative relief may be afforded according to the applicable law, and a case where a set of facts is asserted which would lead to relief on one theory and at the same time another set of facts—inconsistent with the first set—is is alleged which would lead to relief on some other, inconsistent theory. With respect to the latter, the choice is not between alternative forms or theories of relief, but rather between two inconsistent cases altogether. Here, Plaintiffs assert ownership and claim that certain defendants are responsible for damages to Plaintiffs as owners, and at the same time Plaintiffs assert abandonment and claim that an entirely different group of defendants are responsible for destruction

costs and fines.³ While Rule 8(e) was intended to provide flexibility in pleadings, particularly since the complaint is written in the pre-discovery stage, Rule 8 does not allow for this type of contradictory pleading.

Because Plaintiffs' Proposed Amended Complaint does not cure the ripeness problem addressed by the Court in dismissing Claim 5 of the Original Complaint, leave to amend would be futile, and therefore must be denied.

V. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Reconsideration is **DENIED**, and Plaintiffs' Motion for Leave to File Instant First Amendment Complaint is **DENIED**.

IT IS SO ORDERED.

s/Algenon L. Marbley
ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

DATED: November 28, 2006

³ The Court offers no opinion at this time as to what, if any effect, the abandonment of property has on the obligations and liabilities of the abandoners.

APPENDIX G

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

No. C2-05-1097

[Filed June 13, 2006]

OHIO MIDLAND, INC., <i>et al.</i>)
)
Plaintiffs,)
)
v.)
)
GORDON PROCTOR, Director,)
Ohio Department of)
Transportation, <i>et al.</i>)
)
Defendants.)
)

JUDGE ALGENON L. MARBLEY
Magistrate Judge Abel

OPINION & ORDER

I. INTRODUCTION

This matter comes before the Court on the Motion to Dismiss Plaintiffs' Complaint pursuant to Rules 12(b)(1) and 12(b)(2) of the Federal Rules of Civil

Procedure by Defendant Joe Manchin III ("Manchin"), in his capacity as the Governor of West Virginia. For the reasons set forth herein, the Court **GRANTS** Defendant's Manchin's Motion.

II. STATEMENT OF FACTS¹

A. Background

On September 12, 1922, the United States Congress authorized, by House Bill 11901, to construct, maintain and operate a bridge and approaches across the Ohio River in order to connect the City of Benwood, WV and the City of Bellaire, Ohio. Complaint ¶ 3. In issuing the House Bill, Congress expressly reserved to itself the right to alter, amend or repeal its authorization. *Id.* The bridge is commonly referred to as the "Bellaire Bridge" (hereinafter, "the Bridge"). *Id.*

The Interstate Bridge Company ("IBC") constructed, operated and maintained the Bridge as a "toll bridge" until 1991, at which time the Ohio Department of Transportation ("ODOT"), having the right of appropriation, purchased the existing bridge ramp on the Ohio side of the river from IBC for the construction of Ohio Route 7. *Id.* ¶ 4.

Defendants ODOT and the IBC allegedly entered into two agreements regarding the Bridge. See Complaint ¶ 10-11. First, on December 5, 1990, ODOT and IBC entered the first agreement (hereinafter,

¹ In his Motion to Dismiss, Defendant Manchin assumes that all allegations in the Complaint are true. See Def.'s Motion at 2.

"Agreement #1"), a contract for the sale of the real property constituting the area of the existing ramp on the Ohio side of the river, which made no provision for any damages to the residue of the Bridge owned by IBC. *Id.* ¶ 10. Second, on January 7, 1991, ODOT and IBC executed the second agreement (hereinafter, "Agreement #2"), a contract through which both parties alleged payment for the real estate and damages to the residue of the Bridge. *Id.* ¶ 11. Agreement #2 allegedly provided for the exact amount of compensation as Agreement #1, which, in turn, provided compensation for the land only. *Id.* ¶ 11.

On March 22, 1991, the remaining portion of the Bridge, and the assets of IBC were purchased by Plaintiff, Roger Barack ("Barack"), and all assets were assigned to him by bill of sale. *Id.* Subsequent to the aforementioned asset transfer, IBC became a defunct corporation. *Id.* According to Plaintiffs' Complaint, when Barack purchased the Bridge, ODOT was working on plans to re-connect the Ohio side of the Bridge to the main part of the Bridge, so that it could re-open to traffic. Complaint ¶ 5. ODOT later decided, however, that it would neither reconnect the Bridge in Ohio, nor allow Plaintiffs to build a ramp to the Bridge. *Id.* ¶ 7. Thereafter, Barack assigned any and all interests he had to the remaining Bridge assets to co-Plaintiff, Ohio Midland, Inc. ("Ohio Midland"). *Id.* ¶ 8.

The U.S. Coast Guard (the "Coast Guard") recently adjudged the Bridge to be an "unreasonable obstruction to navigation," and, accordingly, it has issued orders for Plaintiff Barack to remove the Bridge. Complaint ¶ 9. Further, the Coast Guard has issued orders for the payment of \$300,000.00 plus

interest and administrative costs as civil penalties for Barack's alleged failure to comply with its order of removal.²

B. Procedural History

On December 5, 2006, Barack and Ohio Midland (collectively, "Plaintiffs") filed their initial complaint (the "Complaint") against the following defendants: (1) Gordon Proctor, in his official capacity as Director of ODOT; (2) ODOT; (3) Jim Spain, in his official capacity as Deputy Director of ODOT District 11 (collectively, "ODOT Defendants"); (4) Admiral Thomas H. Collins ("Collins"), in his capacity as Commandant of the Coast Guard; (5) Joe Manchin III ("Manchin"), in his capacity as Governor of West Virginia; (6) Norfolk Southern Railway Co. ("NSR"), care of CT Corp. System, its statutory agent; and (7) the City of Benwood Mayor's Office, care of Mayor Edward M. Kuca, Jr. ("Kuca") (collectively, "Defendants"). See Complaint ¶ 2.³

Plaintiffs assert the following eight claims against the various Defendants: (1) Plaintiffs bring Claim 1

² Barack appealed the Coast Guard's administrative order, and the case, which is currently pending in Federal Court, has been consolidated with the instant case. See *Roger Barack v. U.S. Coast Guard Commandant*, Case No. C2-05-1044.

³ Plaintiffs assert their claims against Defendants Collins, Manchin, and Kuca in their capacities as the Commandant of the Coast Guard, the Governor of West Virginia, and the Mayor of Benwood, West Virginia, respectively. Throughout this Opinion and Order, therefore, in referencing Collins, Manchin, and Kuca, by extension, the Court references Defendants Coast Guard, West Virginia, and City of Benwood.

against the ODOT Defendants alleging that because ODOT did not pay additional consideration when it entered into Agreement #2 with IBC, Agreement #2 is void, entitling Plaintiffs to money damages for the residue and/or remainder of the Bridge caused when ODOT allegedly "took" the Bridge under Agreement #1; (2) Plaintiffs bring Claim 2 against the ODOT Defendants and allege that ODOT breached Agreement #1, depriving Plaintiffs of a fair opportunity to either remove the salvage materials from the Bridge surroundings or to account for the fair market value of those materials, entitling Plaintiffs to money damages; (3) Plaintiffs bring Claim 3 against the ODOT Defendants and assert that ODOT has a duty and obligation to develop specifications for and to build a replacement ramp over State Route 7 to allow Plaintiffs to continue use of the Bridge as a toll bridge; (4) Plaintiffs bring Claim 4 against the ODOT Defendants and assert that ODOT's failure to replace the ramp unilaterally closed the Bridge for traffic without federal permission in violation of House Bill 11901, depriving Plaintiffs of their civil rights under the Commerce Clause pursuant to 42 U.S.C. § 1983; (5) in Claim 5, which Plaintiffs assert against Manchin, Kuca, Collins, and NSR, Plaintiffs claim that should the Court choose not to compel ODOT to construct a ramp to keep the Bridge open, the Court should alternatively deem the Bridge "abandoned" and order that, pursuant to Ohio and West Virginia laws, the remainder of the Bridge must revert to the owners of the land; (6) in Claim 6, Plaintiffs argue that if the Court determines under Claim 5 both that the Bridge is abandoned and that the remainder of the Bridge must revert to the owners of the land, the Court should enjoin the Coast Guard from enforcing its order that Plaintiffs either remove the remainder of the

Bridge or pay penalties for failing to do so; (7) in Claim 7, Plaintiffs contend that should the Court decide *not* to enjoin the Coast Guard as requested in Claim 6, the Court should order ODOT to pay the necessary penalties and costs for the Bridge's removal; (8) finally, in Claim 8, Plaintiffs assert that because they disagree with the Coast Guard as to whether the Coast Guard has jurisdiction over the Bridge, the Court should make a judicial interpretation of the extent of the Coast Guard's authority. See Complaint ¶¶ 11-18.

Plaintiffs request the following relief. First, Plaintiffs ask the Court to issue an order forcing ODOT to construct a vehicular ramp over Ohio State Route 7 to permit the use of the Bridge for vehicular traffic and enjoining ODOT from impeding the Plaintiffs' use of the Bridge as a toll bridge. Complaint at 7, ¶ 1. Second, Plaintiffs request that if the Court orders ODOT to construct a ramp as per its request, Plaintiffs should be awarded damages for their loss of toll profits from the date of removal of the ramp to the date of completion of the new ramp and the reopening of the bridge to vehicular traffic. *Id.* ¶ 2. Third, Plaintiffs contend that should the Court choose *not* to order Defendant ODOT to construct a ramp over Ohio State Route for vehicular traffic, it should alternatively order ODOT to file appropriation proceedings to determine the amount of damages due to Plaintiffs for the remainder of the Bridge in their possession at the time ODOT allegedly "took" the ramp from Plaintiffs. *Id.* ¶ 3. Fourth, Plaintiffs request money damages in the amount of \$500,000.00 for the alleged fair market value of the salvage materials of the ramp, and in the amount of \$5,000,000.00 for their claim that ODOT violated their civil rights. *Id.* ¶ 4.

Finally, Plaintiffs request any further relief as the nature of the case may require. *Id.* ¶ 9.

Claim 5, the claim which asks the Court to allow Plaintiffs to abandon the Bridge so that ownership of the Bridge may revert back to the landowners, is the only claim that Plaintiffs assert against Defendant Manchin. On December 23, 2005, Defendant Manchin brought the Motion to Dismiss Claim 5 currently at issue. The Motion is now ripe for this Court's review.

IV. LAW AND ANALYSIS

Defendants have asserted that Claim 5 must be dismissed pursuant to Rules 12(b)(1) and 12(b)(2) of the Federal Rules of Civil Procedure for lack of personal jurisdiction and lack of subject matter jurisdiction under. Upon looking at the facts, however, this Court finds that Plaintiffs lack standing to assert Claim 5 because it is not yet ripe. *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 138 (1974) (even when a ripeness question in a particular case is prudential, the court may raise it on its own motion, and "cannot be bound by the wishes of the parties").

The concept of standing to sue is at the core of the "case-or-controversy" requirement of Article III of the Constitution. *See Allen v. Wright*, 468 U.S. 737, 751 (1983). The Supreme Court has consistently held that standing has three elements which a party invoking federal jurisdiction (in this case, Plaintiffs) must establish. *Id.*

First, the plaintiff must have suffered an "injury in fact"-an invasion of a legally protected interest which is (a) concrete and particularized,

and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly. . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of the Wildlife, 504 U.S. 555, 560-61 (1992) (internal citations omitted). The Supreme Court has noted that the "ripeness doctrine" is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction. See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976); *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972). Under the "ripeness doctrine" "a claim resting upon "contingent future events that may not occur as anticipated, or indeed may not occur at all," is not fit for adjudication." *Texas v. U.S.*, 523 U.S. 296 (1998) (whether Texas would impose sanctions was contingent on a number of factors; therefore, the plaintiffs' request for sanctions was not yet ripe).

In this case, the Court finds that Plaintiffs' Claim 5, rather than being "actual or imminent," is purely conjectural, and, therefore, not yet ripe. As noted *supra*, Plaintiffs bring Claims 1 through 4 of their Complaint against ODOT Defendants requesting that the Court find ODOT Defendants to be in breach of Agreements #1 and #2, and asking the Court for money damages to compensate them for the residue of the Bridge. Further, Plaintiffs request that the Court order ODOT Defendants to replace the ramp over

State Route 7 to allow Plaintiffs to continue to use the Bridge as a toll bridge. See Complaint ¶¶ 11-14. Claim 5, which Plaintiffs assert against Defendants Manchin, Kuca, Collins, and NSR, states that, “*if Defendants ODOT are not compelled to construct a ramp to keep the [B]ridge open, as required by law, and the [B]ridge is deemed abandoned then* the remainder of the bridge as a structure should be ordered to revert to the owners of the land pursuant to Ohio and West Virginia Laws.” See *id.* ¶ 15 (emphasis added). Looking at the plain language of Plaintiffs’ Claim 5, therefore, Claim 5 only becomes ripe if the Court chooses *not* to compel the ODOT Defendants to rebuild a ramp and/or to deem the Bridge abandoned. Thus, it is evident that Claim 5 depends on this Court’s decision regarding Claims 1 through 4, and such contingent claims are not fit for adjudication. See *Texas*, 523 U.S. at 296. Accordingly, the Court **GRANTS** Defendant Manchin’s Motion to Dismiss Plaintiffs’ Claim 5, and dismisses Defendant Manchin as a Defendant in this matter.

As set forth in the Statement of Facts, Plaintiffs assert Claim 5 against Defendant Manchin, in addition to Defendants Kuca, NSR, and Collins. Claim 5 is the only Claim which Plaintiffs assert against Defendants, Kuca and NSR. Hence, as previously discussed in regards to Defendant Manchin, because this Court dismissed Claim 5, Defendants Kuca and NSR are also dismissed as Defendants in this matter.

V. CONCLUSION

For the foregoing reasons, Defendant’s Manchin’s Motion to Dismiss Claim 5 is **GRANTED**. Claim 5 is hereby dismissed, and Defendants Manchin, Kuca, and NSR are hereby dismissed as Defendants. Defendant

Kuca's Motion to Dismiss Plaintiffs' Complaint pursuant to Rules 12(b)(1) through (6) of the Federal Rules of Civil Procedure and Defendant NSR's Motion for Summary Judgment are now **MOOT**.

IT IS SO ORDERED.

s/Algenon L. Marbley
ALGENON L. MARBLEY
UNITED STATES DISTRICT JUDGE

DATED: June 13, 2006

APPENDIX H

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 07-3575

[Filed October 30, 2008]

OHIO MIDLAND, INC., ET AL. ,)
)
Plaintiffs-Appellants,)
)
v.)
)
OHIO DEPARTMENT OF)
TRANSPORTATION, DISTRICT 11,)
JIM SPAIN, DEPUTY DIRECTOR, ET AL.,)
)
Defendants-Appellees.)

ORDER

BEFORE: GILMAN, ROGERS, and MCKEAGUE,
Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for

rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green
Clerk

APPENDIX I

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

No. 2:05-cv-1044

[Filed March 6, 2007]

Roger Barack,)
)
Plaintiff,)
)
v.)
)
U.S. Coast Guard Commandant,)
)
Defendant.)
)

Judge Marbley
Magistrate Judge Abel

ORDER

Plaintiff brings this action claiming that the Coast Guard unlawfully issued an order stating that a bridge owned by him was an unreasonable obstruction to navigation and requiring that he pay a penalty fee for failure to remove it. This matter is before the Court on Defendant Admiral Thomas Collins' May 10, 2006 motion to remand. (Doc. 8).

I. Background

Defendant contends that this matter should be remanded to the Coast Guard so that it may conduct a detailed investigation pursuant to 33 C.F.R. Part 116 to determine whether the bridge at issue is an unreasonable obstruction to navigation. He states that even if the Court decides that Plaintiff is correct, and the agency action cannot be sustained on the record, the Court must remand the matter to the agency for additional investigation or explanation. Further, he claims that remanding this matter for additional investigation will promote efficiency as the agency might be able to resolve the matter on its own. This is especially so in this case, Defendant argues, as Plaintiff is contending that the Coast Guard failed to conduct a sufficiently thorough investigation of the reasonableness of the bridge, and remand will allow the Coast Guard to conduct such a detailed investigation.

Plaintiff states that he will not oppose remand if the Court will impose four conditions, namely (1) the Coast Guard will not issue a notice to remove or demolish the bridge; (2) the Coast Guard will, as part of its investigation, inquire into whether officials of the Ohio Department of Transportation (ODOT) have failed to receive approval to deviate from the approved bridge plans by failing to construct, or permit Plaintiff to construct, a new ramp to the bridge; (3) after completion of its investigation, the Coast Guard will schedule a public hearing near the location of the bridge; and (4) the Coast Guard will issue notice of the public hearing to ODOT Directors Proctor and Spain.

Defendant responds to Plaintiff's proposed conditions by stating that they are improper as they seek to prevent the Coast Guard from exercising its lawful authority. Defendant claims that administrative agencies are empowered to administer their legislatively created program and courts typically show deference to their interpretation of their own statutes.

II. Analysis

If a court determines that a decision by an administrative agency cannot be sustained, it "must remand for further consideration of the request." *Wuliger v. Office of the Comptroller of Currency*, 394 F. Supp. 2d 1009, 1013 (N.D. Ohio 2005). Further, the Sixth Circuit has held that "[w]hen an agency seeks a remand to take further action consistent with correct legal standards, courts should permit such a remand in the absence of apparent or clearly articulated countervailing reasons." *Citizens Against the Pellissippi Pkwy Ext. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004).

In this case, there is no apparent or clearly articulated reason why this Court should not grant Defendant's motion to remand. The Plaintiff does not offer any reasons why remand should not be granted. In fact, the Plaintiff does not oppose remand but merely seeks to impose certain conditions that the Coast Guard must follow upon remand. However, courts typically are deferential in their review of how administrative agencies interpret their statutes and implement regulations. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984). Thus, this Court will not make remand

conditional on the Coast Guard's adherence to the conditions requested by Plaintiff.

II. Conclusion

Accordingly, Defendant's May 10, 2006 motion to remand (doc. 8) is GRANTED. This action is hereby REMANDED to the Coast Guard.

s/Algenon L. Marbley
United States District Judge

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No. 08-966

Supreme Court, U.S.
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**In The
Supreme Court of the United States**

OHIO MIDLAND, INC. and ROGER BARACK,
Petitioners,

v.

GORDON PROCTOR, Director, Ohio Department of
Transportation, and JIM SPAIN, Deputy Director,
District 11, Ohio Department of Transportation, and
NORFOLK SOUTHERN RAILWAY CO.,
Respondents.

*On Petition for Writ of Certiorari to the United
States Court of Appeals for the Sixth Circuit*

BRIEF IN OPPOSITION

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February 24, 2009

QUESTIONS PRESENTED

Petitioners pose the following Questions Presented:

1. Does a cause of action for a *per se* permanent physical taking of private property by government, without just compensation in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution, accrue when government first temporarily takes the property, or when the owner is "reasonably on notice" the taking may be permanent, or when the taking actually becomes permanent and the owner knows or should know it is permanent?

2. Where Congress reserved to itself the authority to "alter, amend, or repeal" an act granting its consent to "construct, maintain and operate" a bridge over navigable waters of the United States and later delegated all of its reserved authority to an administrative agency of the executive branch, and where Congress further provided that any deviation from approved bridge plans is unlawful "unless the modification of such plans has previously been submitted to and received the approval of" the administrative agency, does adjudication of a private contract claim that the bridge must be removed require a prior determination of whether the bridge must be removed, by the administrative agency to which Congress delegated all of its reserved authority?

Respondent Norfolk Southern Railway Co. respectfully restates the Questions Presented as follows:

1. In applying the statute of limitations, what is the accrual point for a claim of alleged unlawful

government taking under the Fifth and Fourteenth Amendments to the U.S. Constitution?

2. Does adjudication of a private contract claim, alleging a duty by one party to remove the structure of a non-functioning bridge from the property of another, require a prior determination by the United States Coast Guard as to whether the bridge constitutes an unreasonable obstruction to navigable waters?

**PARTIES TO THE PROCEEDINGS BELOW
AND RULE 29.6 STATEMENT**

Plaintiffs-Appellants: Ohio Midland, Inc. and Roger Barack.

Defendants-Appellees: Gordon Proctor, Director, Ohio Department of Transportation; Jim Spain, Deputy Director, Section 11, Ohio Department of Transportation; Norfolk Southern Railway Co.¹

Norfolk Southern Railway Co. is a wholly-owned operating subsidiary of Norfolk Southern Corporation, which is a publicly-owned company.

¹ As noted by Petitioners in their Petition for Writ of Certiorari, other previous defendants in this action were Joe Manchin, Governor of West Virginia, the City of Benwood, West Virginia, and the Commandant of the United States Coast Guard. However, these defendants were not parties to the appeal because Petitioners have not appealed any orders applicable to them. The Commandant, however, is a "party to be served" under this Court's Rule 29.4(a), and has been served with a copy of this Brief in Opposition.

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RELEVANT STATUTORY PROVISIONS

Norfolk Southern Railway Co. respectfully submits the following additions to Petitioners' Relevant Statutory Provisions:

U.S. CONST. amend. V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. XIV, § 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

Norfolk Southern Railway Co. respectfully incorporates by reference the Factual Background

compiled by the United States Court of Appeals for the Sixth Circuit in the opinion below, included in the Petition for Writ of Certiorari at Appendix A, pp. 2a-10a. See GRESSMAN, ET AL., SUPREME COURT PRACTICE (9th Ed. 2007) 501 (“[T]he statement of the facts in the opinion below . . . will often be sufficient from respondent’s point of view”).

SUMMARY OF THE ARGUMENT

This Court should deny the petition for a writ of certiorari. No conflict exists among the circuit courts as to when a takings claim accrues and, even if such conflict existed, Petitioners’ claims are time-barred under any standard. Further, Petitioners’ takings claims became “permanent” at the time of the initial alleged taking, and the applicable statute of limitations expired long before Petitioners filed their complaint.

Additionally, Norfolk Southern Railway Co. (“Norfolk”) has been granted orders by both the district and appellate courts requiring Petitioners to remove the non-functioning bridge from Norfolk’s property, based upon a contractual requirement that Petitioners “ultimately remove” the bridge when it is no longer used to transport highway traffic. The bridge stopped carrying such traffic in 1991.

In 1998, the United States Coast Guard determined that the non-functioning bridge constituted an unreasonable obstruction to navigation and required Petitioners to provide plans to demolish the bridge. The Coast Guard remains in the process of conducting an investigation to confirm or disaffirm that initial determination - however, that determination will in no

way affect Norfolk's contractual right (and prior court orders) to have the bridge removed from Norfolk's property.

For these reasons, this Court should deny Petitioners' petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

A. There is no compelling reason for this Court to issue a writ of certiorari because Petitioners' takings claims are time-barred under any accrual analysis.

Petitioners first assert that this Court should accept certiorari because the circuits are allegedly divided over the point at which a takings claim accrues. Norfolk first responds that no such conflict exists. Further, even if a conflict existed, it would be irrelevant in the context of this case because, under any of the accrual points cited in Petitioners' brief, Petitioners' takings claims accrued and expired long before they filed their complaint.

1. Petitioners' takings claims are time-barred based upon the accrual analyses from the Sixth, Tenth, and First Circuits.

Petitioners argue that the Sixth Circuit "has fashioned a rule that a permanent physical taking claim accrues when a property owner is 'realistically on notice' that a physical taking may have become permanent." Pet. Writ Cert., p. 18. While Petitioners provide no citation of authority for this assertion, it appears that Petitioners are referring to the prior

decision issued in this matter by the Sixth Circuit. However, that is not the rule stated by that court.

The Sixth Circuit is clear as to when a takings claim accrues, and that law was appropriately applied by the lower courts. In its decision affirming the district court in this matter, the Sixth Circuit cited *Ruff v. Runyon*, 258 F.3d 498, 500 (6th Cir. 2001) for the premise that the statute of limitations for Petitioners' takings claims "begins to run under federal law 'when plaintiffs knew or should have known of the injury which forms the basis of their claims.'" Pet. Writ Cert., App. A, p. 12a. The court then continued, "In determining when the cause of action accrues in section 1983 actions, courts have looked to what event should have alerted the typical lay persons to protect his or her rights," citing *Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516, 520 (6th Cir. 1997). *Id.*²

Petitioners compare the approach of the Sixth Circuit with that of the Tenth Circuit, which has determined that "the limitations period [for a takings claim] begins to run at the time of the taking." Pet. Writ Cert., p. 17, citing *McIntyre v. Board of County Comm'rs*, 252 Fed. App. 240, 246 (10th Cir. 2007). Petitioners contend this approach is also followed by the First Circuit. See *Vistamar, Inc. v. Fagundo-Fagundo*, 430 F.3d 66 (1st Cir. 2005).³

² Norfolk emphasizes that the district court likewise cited these exact same two cases when determining the point of accrual for Petitioners' takings claims. Pet. Writ Cert., App. E, p.78a.

³ Petitioners assert that the dissent in *Vistamar* would instead follow the accrual rule of the Federal Circuit. See Pet. Writ Cert.,

In presenting the approaches of these circuits, Petitioners cannot validly assert that they have been harmed by the Sixth Circuit's ruling. Indeed, the discovery rule approach of the Sixth Circuit (*e.g.*, applying a "knew or should have known" standard) is more accommodating for Petitioners than that of the First and Tenth Circuits, which flatly provide that the claim accrues upon the taking, with no apparent regard for the discovery date.

All parties (and the lower courts) agree that ODOT demolished the ramp in 1991, and it has never been rebuilt. See Pet. Writ Cert., p. 5 ("ODOT purchased the ramp and removed it, which suspended operation of the bridge") and pp. 41a and 84a (district court Opinions & Orders noting bridge ramp was demolished in 1991). Petitioners also allege that requests to ODOT to allow Petitioners the opportunity to rebuild the ramp have been either rejected or unanswered, and in 1998 the Coast Guard first informed them that the bridge was an unreasonable obstruction to navigation, requiring Petitioners to provide plans within 60 days to demolish the bridge. (*Id.* at p. 6)

Given this undisputed chronology of events, the Sixth Circuit applied the appropriate accrual standard and held that

[I]t is clear that Barack would have been on notice during the early 1990s that ODOT did

p. 18. However, *Vistamar* does not offer a dissenting opinion, and Norfolk is unable to determine the authority for Petitioners' assertion that the 1st Circuit has entertained in any way the view of the Federal Circuit on this issue.

not intend to rebuild the ramp. Moreover, Barack realistically was on notice that ODOT did not intend to allow him to build his own ramp sometime during the early 1990s, when ODOT is alleged to have repeatedly refused to grant Barack permission to build his own ramp, whether through an outright denial of permission or inaction on his request. *Even giving plaintiffs the benefit of the doubt, Barack was certainly on notice that there would be no new ramp in 1998, when ODOT was prepared to stand by and allow the bridge to be razed following the Coast Guard's demolition order. Consequently, the plaintiffs had reason to know of their injury in the early 1990s, and in 1998 at the latest, and the statute of limitations therefore accrued much longer than two years before plaintiffs commenced suit in 2005.*

Pet. Writ Cert., App. A, p. 12a-13a (emphasis added). Thus, the appellate court closely examined the history of events, and plainly determined that the statute of limitations for Petitioners' takings claims had expired long before filing. This Court should agree and deny Petitioners' writ.⁴

⁴ Norfolk emphasizes that Petitioners previously received hundreds and hundreds of thousands of dollars to cover the expenses associated with Petitioners' contractual requirement to demolish the bridge. (See Pet. Writ. Cert., App. A, pp. 3a - 4a.)

2. Petitioners' taking claims became "permanent" immediately upon the alleged taking, and such claims are likewise time-barred as held by the Federal Circuit.

Petitioners next assert that the Federal Circuit follows an accrual rule that a takings claim accrues only "when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action" and claimant knew or should have known of the existence of such events. Pet. Writ Cert., p.18, citing *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345 (Fed. Cir. 2006). However, Petitioners then proceed to characterize this standard in Petitioners' own language. According to Petitioners, this standard can be restated as a "takings claim accrues when (1) a physical taking **actually** becomes permanent, and (2) the owner knew or has reason to know the taking has become permanent." Pet. Writ Cert., pp. 18-19 (emphasis in original).

Petitioners apparently seek to persuade this Court that the permanency of the alleged taking in this matter arose only after the Coast Guard issued its final agency decision on October 18, 2005, and Petitioners' claim would have first accrued at that point, within two years of their filing the complaint. *Id.* at pp. 19, 6. Petitioners therefore attempt to rely on the "permanent" aspect of their alleged takings claim in their effort to extend the limitations period. This Court should reject this argument.

Petitioners correctly note that this Court has provided no definition of "permanent" in the takings context, though this Court has recognized that,

because any government occupation can always possibly be abandoned at some future time, permanent cannot be given its ordinary meaning of forever. Pet. Writ Cert., p. 17, citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). However, the permanency issue has been fully addressed by the Federal Circuit.

In *John R. Sand & Gravel*, that court specifically recognized that “permanent” requires a special definition in takings contexts:

In the context of physical takings ***permanent does not mean forever, or anything like it.*** A government occupation is permanent when the government’s intrusion is a substantial physical occupancy of private property. The government’s occupation may be permanent even if it is not exclusive, or continuous and uninterrupted.

457 F.3d at 1357 (emphasis added; internal quotations omitted.)

As they now attempt in this Court, Petitioners also tried to convince the Sixth Circuit Court of Appeals that the taking was not “permanent” until 2005 upon the Coast Guard Final Determination. However, the appellate court rejected that argument:

The plaintiffs seek to avoid this conclusion [e.g., that the taking claims are time-barred] by arguing that, because the ODOT defendants could theoretically have authorized the construction of a new ramp until the Coast Guard finally ordered the bridge’s demolition,

the plaintiffs' injury did not become permanent, and thus the statute of limitations did not begin to accrue, until October 2005. *This argument is unpersuasive. Assuming plaintiffs are correct that the statute of limitations did not begin to accrue until it became clear that their injury was permanent, the relevant inquiry is permanent versus temporary, not physical possibility versus impossibility.* On plaintiff's theory of taking, the time at which the deprivation became "permanent rather than temporary" is determined by ODOT, not by the Coast Guard's actions. After all, the plaintiffs' theory is that ODOT's refusal to build or allow construction of a new ramp has rendered the bridge economically valueless. Regardless of the Coast Guard's actions, the bridge is economically valueless on this theory as long as ODOT maintains its positions not to allow construction of a new ramp. Consequently, while it is easy to see how the Coast Guard's order to demolish the bridge renders the bridge's lack of value "permanent," the *plaintiffs' injury was "permanent rather than temporary" in the relevant sense when it was clear that ODOT would neither build nor allow construction of a new ramp.* As explained above, this occurred in 1998 at the latest.

Utilizing any of the accrual approaches cited by Petitioners, their takings claims must fail as time-barred. This Court should deny the petition for writ of certiorari.

B. There is no compelling reason for this Court to issue a writ of certiorari based upon Petitioners' question presented that addresses whether a prior determination by the United States Coast Guard is necessary in a matter involving a private contract claim.

Stated simply, the issue is this – Norfolk has obtained court orders, from both the district and appellate courts, requiring Petitioners to remove the non-functioning bridge from Norfolk's property, which removal is required under the contractual Lease Agreement between Norfolk and Petitioners. However, the Coast Guard is still conducting an investigation as to whether the non-functioning bridge constitutes an unreasonable obstruction to navigable waters. If so, it must be removed pursuant to the applicable federal law(s). If not, presumably, the Coast Guard will not require the bridge's demolition. However, in no event will the Coast Guard order that the bridge *must* remain standing.

Both courts below have reviewed this issue and determined that no conflict, interference, or even connection exists between the Coast Guard's future determination regarding the bridge's demolition and Norfolk's contractual right to now have the bridge removed from its property. These courts' respective, well-reasoned analyses refute fully Petitioners argument, and Norfolk accordingly reproduces these analyses *verbatim*. The district court held:

Barack's contractual duty under the Lease Agreement to "ultimately remove" the Bridge does not in any way depend on the

Coast Guard's determination of whether the Bridge structure is an unreasonable obstruction to navigable waters. ... The purpose of the Lease Agreement – to provide land to the lessee for its “highway and traction” Bridge – has been fulfilled. The Bridge has been non-functioning for years, and under the agreement “for the protection and safety of the property owned . . . as well as the protection and safety of the employees, patrons and licensees” of Norfolk, Barack must now remove it.

Pet. Writ Cert., App. B, pp. 33a-34a (emphasis added). In affirming the district court's ruling, the appellate court similarly held:

Because all parties agree that the plaintiffs have a contractual duty to remove the bridge once it can no longer be used as a bridge, it is fair to say—as the district court did—that this duty was triggered sometime in the sixteen years during which the bridge has been inoperable with no reasonable expectation of re-use. ***This duty in no way hinges on the actions of the Coast Guard.***

Pet. Writ Cert., App. A, p. 18a (emphasis added).

This Court should determine likewise and deny Petitioners' writ.

CONCLUSION

For all of the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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